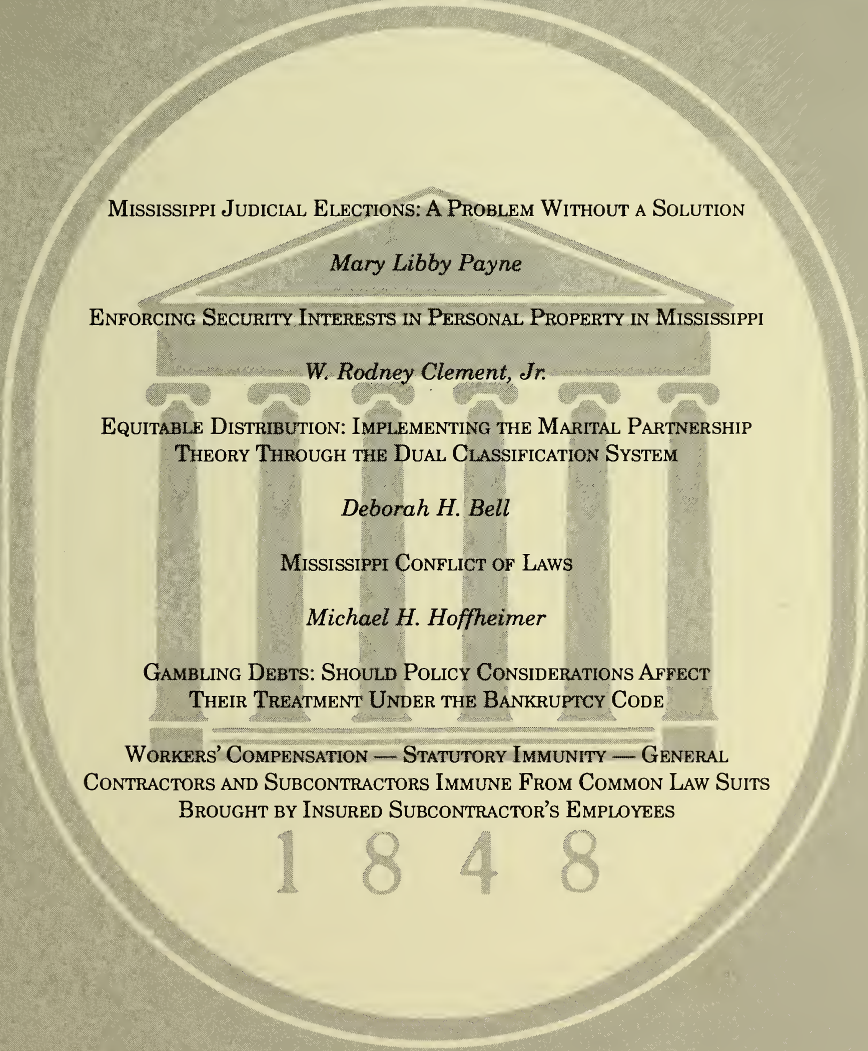
MISSISSIPPI LAW JOURNAL



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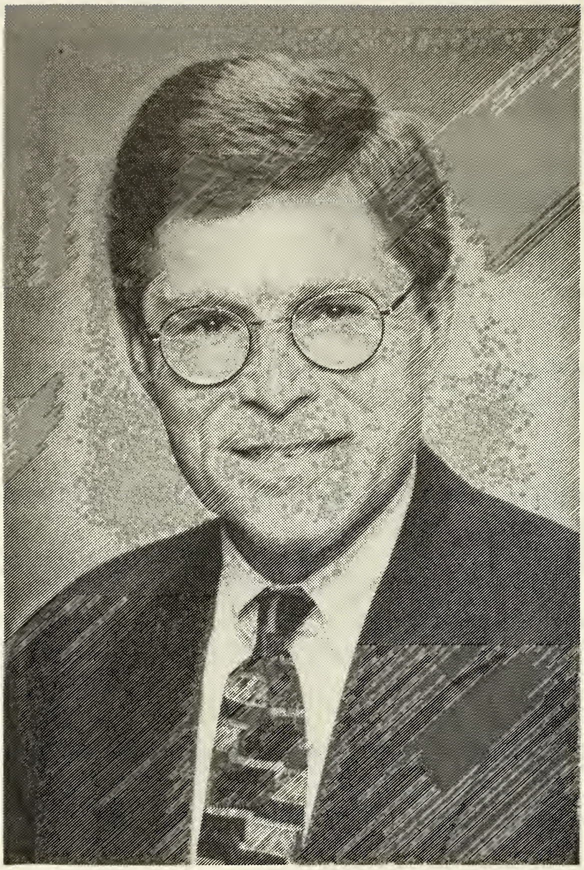

Former Editor-in-Chief of the *Mississippi Law Journal* Samuel M. Davis returned to Mississippi this summer to become dean of the University of Mississippi School of Law.

Davis, 53, was named to the position following a national search and assumed his new post in July 1997. Davis comes to the University of Mississippi from the University of Georgia School of Law. He joined the Georgia law faculty in 1970, and most recently was the Allen Post Professor of Law and associate vice president for academic affairs.

Davis has written extensively in the fields of children's law and family law. A second edition of his book, *Children in the Legal System: Cases and Materials*, was published in 1997.

Davis holds a masters of laws degree from the University of Virginia and a Juris doctor degree from the University of Mississippi. His undergraduate degree in political science and history is from the University of Southern Mississippi.

The Board and members of the *Mississippi Law Journal* welcome Samuel M. Davis back to the University of Mississippi and anticipate a bright future for the School of Law under his leadership.

MISSISSIPPI JUDICIAL ELECTIONS: A PROBLEM WITHOUT A SOLUTION?

Mary Libby Payne[*]

INTRODUCTION

In his "State of the Judiciary" address to the 1995 legislative session in joint assembly on March 21, then Chief Justice Armis Hawkins warned Mississippians about the enormous cost of judicial campaigning in Texas and Alabama and urged the legislature to act to prevent such an occurrence in Mississippi.[1] The ten judges of the Court of Appeals had just been elected in November of 1994, and I, for one, was still repaying the bank for the loan I had taken out to buy media time in the runoff. According to the figures compiled from disclosures of the candidates to the office of the Secretary of State of Mississippi, of the twenty-two candidates for the ten posts in the 1994 Court of Appeals race, a total of $1,068,953.17 was expended, averaging $44,539.71 per candidate. However, the expenditures varied widely. The highest amount spent by a Court of Appeals candidate was $163,032.24, which was more than $50,000 above the next highest spender. The least spent by a Court of Appeals candidate was $2,396.99. In seven of the ten races, the highest spenders (ranging from $163,032.24 to $21,856.00) won their elections.[2]

---

[*] Judge Mary Libby Payne, Charter member of the Mississippi Court of Appeals; former Dean and Professor of Law at Mississippi College School of Law, and former executive director of the Mississippi Judiciary Commission which performed the first statewide study of the Mississippi judicial system. She acknowledges with appreciation the technical assistance provided her by Farrell Tadlock, Staff Attorney for the Court of Appeals, Beth Richmond, Editor of Opinions for the Court of Appeals and Martha Ponder, Judicial Assistant to Judges Payne and Herring. She also acknowledges with gratitude the work of Phil Carter and David Roberts of the Secretary of State's Office for compilation of the elections statistics.

[1] Justice Armis E. Hawkins, Speech on the State of the Judiciary before the Mississippi State Legislature (Mar. 21, 1995).

The 1996 Supreme Court races were a different story. Although there were only eleven candidates running for four seats, $1,407,512.60 was spent, averaging $127,955.69 per candidate.[3] However, as with the Court of Appeals statistics, averages are meaningless. With Chief Justice Dan Lee's retirement, there were five candidates on the ballot for that post.[4] The winner spent $252,870.00, in a non-partisan election. Since there was no primary, this figure represents general election and runoff cost. The deadline for qualifying was the first Friday in May and the election was November 5.[5] No matter what the financial reports may have indicated, many perceived the races to be not about which candidates could best be counted on to render justice, but instead aboutbattles between BIPEC (Business and Industry Political Education Committee) and MTLA (Mississippi Trial Lawyers Association).[6]

Three other Supreme Court positions were on the ballot and all three incumbents had opponents. The Southern District incumbent, Edwin Lloyd Pittman, had risen to the bench by winning a contested race in 1988.[7] He was a popular candidate with broad-based name identification as a result of having previously served in elected office as a state Senator, the Secretary of State, and the Attorney General.[8] The challenger was Circuit Court Judge Jerry O. Terry of the Gulf Coast who was first appointed to the bench to fill the vacancy resulting from the murder of Judge Vincent Sherry in 1987.[9] Terry was re-elected to that post consistently to the present.[10] Pittman's expenditures of $165,623.00 exceeded Terry's expenditures of $148,911.72.[11]

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[2] Public Records of the Mississippi Secretary of State, 1994 Court of Appeals Campaign Finance Spending.

[3] Public Records of the Mississippi Secretary of State, 1996 Supreme Court Campaign Finance Spending.

[4] Joseph Ammerman, *State Supreme Court Candidate Cites Dignity of Position*, CLARION-LEDGER (Jackson, Miss.), Oct. 24, 1996, at B3.

[5] MISS. CODE ANN. § 23-11-997 (1990), repealed by Laws, 1986, ch. 495, § 345.

[6] Beverly Pettigrew Kraft, *Banks, Mills, Pittman Re-elected to Mississippi's Highest Court,* CLARION-LEDGER (Jackson, Miss.), Nov. 6, 1996, at A9 [hereinafter Kraft I]; John R. Eubank, Jr., *M-FAIR Isn't for Common Person in Judicial System*, CLARION-LEDGER (Jackson, Miss.), Apr. 17, 1997, at A8.

[7] Mississippi Supreme Court Justices, (visited Aug. 26, 1997) <http://www.mslawyer2.com/mssc/justice.html>.

In the Northern District, Justice Mike Mills, who had been appointed by the governor to fill the unexpired term of Justice Armis Hawkins, had to run in the next judicial election to retain his seat.[12] In a hotly contested race, Circuit Court Judge Thomas J. Gardner, III, of Tupelo unsuccessfully challenged the governor's appointee.[13] The reports of expenditure on these races show that Mills' campaign spent $249,351.99 while Gardner's campaign spent $137,102.81.[14]

In the Central District, the incumbent Fred Banks again faced opposition. Appointed in 1991 to fill the unexpired term of Reuben Anderson, who had returned to private practice,[15] Banks had been opposed in his first election (in November 1991) by Chancery Judge W. O. "Chet" Dillard, Jr. Unfortunately, the amounts spent on that race are not readily available for comparison. In 1996, Ryan Hood, who had twice run unsuccessfully for the post of State Auditor, opposed Banks for a full term. Banks' campaign spent $159,908.25, while Hood's campaign spent $88,201.29.[16]

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[8] *Id.*

[9] Miss. Judicial College, 1995, MISSISSIPPI TRIAL AND APPELLATE JUDGES DIRECTORY.

[10] *Id.*

[11] Public Records of the Mississippi Secretary of State, *supra* note 3.

[12] *See* MISS. CODE ANN. § 23-15-849 (Supp. 1997) ("Vacancies . . . shall be filled for the unexpired term by the qualified electors at the next regular election for state officers or for representatives in Congress occurring more than nine (9) months after the existence of the vacancy to be filled. . . .").

[13] Kraft I, *supra* note 6.

[14] Public Records of the Mississippi Secretary of State, *supra* note 3.

[15] Mississippi Supreme Court Justices, (visited Aug. 26, 1997) <http://www.mslawyer2.com/mssc/justice.html>.

[16] Public Records of the Mississippi Secretary of State, *supra* note 3.

In all three of these races, the incumbents won,[17] but Supreme Court personnel had to accommodate around the campaign schedules of a third of the Court to maintain its continued efficiency. More startling is the fact that a total of $1,407,512.60 was spent in 1996 by eleven candidates for four Supreme Court posts,[18] each of which carried an annual salary of less than $91,000 a year.[19]

In December of 1996, legislative committees met to fashion election reforms.[20] Public hearings were held to which judges, candidates, bar leaders, political action groups, and others were invited.[21] In January of 1997, the Mississippi Bar held a public forum to discuss remedies for such expensive campaigns.[22] Editorials were written extolling the virtues of an appointive system with retention elections following a period of service.

The issue which almost everyone ignored was that three of the four elections that had generated so much attention were *retention* elections, but with opponents. In recent years, retention election campaigns without opponents in states having the "merit system" (or as it is sometimes called, the "Missouri plan") have zeroed in on decisions in specific cases to the point that attacks on supreme court justices have been described as "shooting fish in a barrel."[23]

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[17] Kraft I, *supra* note 6.

[18] Public Records of the Mississippi Secretary of State, *supra* note 3.

[19] MISS. CODE ANN. § 25-3-35 (Supp. 1997).

[20] Beverly Pettigrew Kraft, *Debate Rages Over How State Seats Judges,* CLARION-LEDGER (Jackson, Miss.), Dec. 13, 1996, at B1 [hereinafter Kraft II]; Beverly Pettigrew Kraft, *Judicial Selection Reform Needs More Study, Senate Panel Says,* CLARION-LEDGER (Jackson, Miss.), Dec. 18, 1996, at B3 [hereinafter Kraft III].

[21] *Id.*

[22] Judge Charles Clark and Dean Parham Williams, Report to the Forum on Judicial Election Reform, Sponsored by the Mississippi Bar (Jan. 15, 1997) (on file with author) [hereinafter Clark].

[23] John Gibeaut, *Taking Aim,* A.B.A. J., Nov. 1996 at 54.

I. SOLVING THE JUDICIAL ELECTION PROBLEM

Perhaps the best way to approach solutions to the judicial election "problem" is to examine (1) history in Mississippi and elsewhere and (2) regulations now in place.

A. History in Mississippi

Judicial selection has changed markedly in Mississippi since a 1969 study performed by the Mississippi Judiciary Commission revealed that Mississippi in fact did not have an "elected" judiciary.[24] The pattern was that the Governor would appoint someone to a post vacated by death or retirement of a sitting judge.[25] That appointee would then run unopposed and keep the seat until his death or retirement.[26] Open seats, where an incumbent decided not to seek re-election, were filled by popular election, but those campaigns were at best "low key."[27] All of this began to change in the mid-1980's as contested judicial elections became more common.[28]

B. Recent History in Other States

In the 1996 retention election of Tennessee Supreme Court Justice Penny J. White, a victims' rights group with close ties to the Republican party waged a campaign against Justice White because of her vote in *one opinion* out of all those handed down by the supreme court in the nineteen months following her appointment.[29] One of the leaders of the opposition defended the attacks on Justice White by pointing out that Tennessee restored the death penalty in 1976 and that there had not yet been an execution.[30] The case at the focal point of the non-retention campaign was one where the prosecutor in the sentencing phase had not jumped through the legal hoops necessary to prove "heinous, atrocious, and cruel" action on the part of the defendant.[31] The case was remanded so that on retrial of the sentence the evidence necessary to justify the death penalty for the convicted felon could be provided.[32] The Tennessee governor and United States Senators (of the party opposite that of the governor who had appointed Justice White) entered into the campaign against her and defeat was assured because of disagreement with one case's result.[33]

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[24] Mary Libby Payne, Address to House Judiciary Committee, Mississippi State Legislature (Dec. 12, 1996).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Mary Libby Payne, *The Mississippi Judiciary Commission Revisited: Judicial Administration: An Idea Whose Time Has Come?,* 14 MISS. C.L. REV. 413, 504 n.825 (Spring 1994).

[29] Gibeaut, *supra* note 23, at 51.

In 1996, an Oklahoma Court of Appeals judge in a retention election had an ad published against him the day before the election by Oklahomans for Jobs and Economic Growth, Inc. The ad scored judges by a review of 130 specially selected cases and evaluated the judges on being "favorable to jobs and economic development."[34] All of the incumbents scored above 50% except for Judge W. Keith Rapp. Since his score was only 41.4% "right" on those 130 cases, the ad was aimed toward his defeat.[35] It should be noted that clippings from newspaper articles in five tort cases were shown at the top of the ad, three of which were from states other than Oklahoma where Judge Rapp had no influence.[36] It should also be noted that two of these were trial verdicts and one was just the filing of a suit. None was an appellate decision.[37]

In Missouri, where the "merit system" plan began, only

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[30] *Id.*

[31] *Id.* at 53.

[32] *Id.*

[33] *Id.* at 54.

[34] Paid Political Advertisement by Oklahomans for Jobs and Economic Growth, Inc., DAILY OKLAHOMAN, Nov. 4, 1996, at 7.

[35] *Id.*

[36] *Id.* The headlines of these articles included "*Woman Who Spills Hot Coffee At McDonald's Awarded $2.7 Million,*" Tucson, Ariz.; "*California prisoner sues after served 'broken cookie,'*" [town not shown] California; "*BMW Paint Job Costs $4 Million,*" Montgomery, Alabama. *Id.*

[37] *Id.*

141 of the 348 state judges run under the "non-partisan" plan.[38] The Missouri Bar evaluates the qualifications of the retention candidates and releases the evaluations to the public in early October by placing copies in courthouses, libraries, other public places, and on the World Wide Web.[39] The president of the Missouri Bar explains the purpose as follows:

> By the very fact that [judges] don't face an opponent and are, thus, prohibited from campaigning, these judges are often largely unknown to the majority of the public. By asking our members to evaluate the qualifications of these judges, the organized bar hopes to serve as a source of information and to encourage the making of informed decisions by voters.[40]

I am unaware of the recourse a candidate might have if the candidate believes the evaluation to be inaccurate or unfair.

In Nebraska a group called "Citizens for Responsible Judges" mounted a campaign against Supreme Court Justice Dan Lanphier "because he *joined* rulings that rejected term limits for elected officials and ordered a number of defendants convicted of second-degree murder to be retried. The timing of their campaign [was] simple: Lanphier just happen[ed] to be the only Nebraska justice up for retention this year."[41] The writer adds, "[b]ut judges, while acknowledging that they are not above criticism, say this kind of attack often is unwarranted because it comes without regard for the context of a particular case or the judge's overall record on the issues involved."[42] The fear seems to be that such attacks will undermine the independence of the judiciary.[43] I agree with Yale Professor Robert H. Gordon who said, "[t]he worst thing you want is for a judge to play to public opinion. . . . It really has a corrupting effect."[44]

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[38] *Judicial Evaluation Survey Results Now Being Tabulated* (visited July 1996) <http://www.mobar.org/sites/mobar/press/bflyO796htm>.

[39] *Id.*

[40] *Id.*

[41] Gibeaut, *supra* note 23, at 51.

[42] *Id.*

[43] *Id.*

On the other hand, the electorate may feel betrayed when a judge refuses to follow the law and instead pursues a direction of his or her own choosing. This reasoning was a major argument in the movement to oust Chief Justice Rose Bird of California in 1986. Because she was personally opposed to the death penalty, she never voted to affirm a death penalty case during her entire tenure, even though the law in California authorized the death penalty in identified types of cases.[45] Even with a different voting history, Justice Rosemary Bartlett of the Florida Supreme Court had a campaign mounted against her in 1992 by law enforcement personnel because she *joined* in a dissent to an affirmance of the death penalty for a first offender. It seemed not to matter that "she had voted to affirm some 200 death sentences in nine years as a justice."[46]

In Utah, several polls were used in regard to the 1996 judicial retention elections. The Salt Lake Tribune, the Utah Judicial Council, and a five year analysis of the appellate records were used to show that two of the thirty-three judges up for retention were viewed poorly by lawyers and are frequently reversed by the Utah Supreme Court. The newspaper stated that the survey was designed to give the voters information on which to base their choices on election day; however, the highest accolades go to a U. S. District Judge who will never be facing the electorate, having been given life tenure with his appointment. The survey also announced that the judge with the poorest overall score was not even up for election that year.[47]

In Alaska, the Alaska Judicial Council distributes evaluations of the state's judges to the public at least 60 days prior to the retention election. The council compiles the evaluations after interviewing 2,650 attorneys, 1,241 peace and probation officers, and all jurors and court personnel who have worked with the judges up for retention. The council requests that the judges pick out three trial, three non-trial, and any other significant cases to be sent to the attorneys involved in those cases to evaluate the judge's handling of the matter. The council reviews other records, such as ethics and conflict of interest forms, filed by the judge. The council holds public hearings which give citizens the opportunity to speak out about their experiences. The council also interviews the judge if the judge requests it. The council compiles all of this information and then issues its evaluations and recommendations at least sixty days before the election. This information is available on the judicial council's home page on the Internet.[48]

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[44] *Id.* at 53.

[45] John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81, 86 (Aug./Sept. 1986).

[46] Gibeaut, *supra* note 23, at 54.

[47] Ted Cilwick & Sheila R. McCann, *Poll of Utah Lawyers Judges Generally Are Doing a Good Job in the State; Lawyer Poll Rates Judges Up for Election*, SALT LAKE TRIB., Oct. 20, 1996, at A1.

This is by no means an exhaustive look at retention elections, nor is it a look at the majority of retention elections, many of which go almost unnoticed by the general voting public. However, I think it demonstrates that retention elections vary widely even though over thirty states use the Missouri plan of appointment followed by retention elections, and it certainly shows that the plan is not a panecea.

II. THE CODE OF JUDICIAL CONDUCT

Now, let us look at the rules that govern judicial elections and appointments. In 1972, the American Bar Association recommended for adoption by the states a Model Code of Judicial Conduct. Mississippi adopted it with a few variations, and its Code of Judicial Conduct has been changed little since that time. The provision relating to judicial elections has been changed once and that was in 1995 in regard to the time when fundraising could be begun by the candidate's financial committee.[49] In 1990, the American Bar Association revised its

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[48] *Judicial Retention Elections and Evaluation of Judges by the Alaska Judicial Council* (visited July 15, 1997) <http://www.ajc.state.ak.us/Retent.

[49] *Compare* MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 7 (1995) (fundraising not permitted earlier than 60 days before qualifying deadline), *with* MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 7 (1994) (fundraising not permitted earlier than 90 days before a primary election).

Model Code of Judicial Conduct to consolidate parts of it so that Canon 7 is now found in Canon 5. The differences will be pointed out as the discussion progresses.

Any person in Mississippi who has run for judicial office in recent years has been subject to the provisions of Canon 7 of the Mississippi Code of Judicial Conduct, whether or not he or she chose to honor them. Rule 8.2(b) of the Mississippi Rules of Professional Conduct, which governs all lawyers, states: "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct."[50] The provisions of Canon 7, which candidates to varying degrees seem to honor in the breach, are 7(B)(1)(c) and 7(B)(2) dealing with campaign promises and campaign finances respectively.

Canon 7(B)(1)(c) states:

> (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:
>
> . . . .
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.[51]

This prohibits a candidate (and under 7(B)(1)(b), any other persons for the candidate) from taking a stand on any issues, such as "being tough on crime," "abortion," "the death penalty," "gun control," "prayer in schools," "malpractice," "tort reform," "civil rights," "environmental protection," or any other issue that voters want to know about a judicial candidate. This is particularly difficult for political campaign consultants to understand or value. A promise to perform faithfully and impartially the duties of one's office seems very bland to political parties since the media seems to thrive on "exciting" campaigns. Because the judiciary has no choice about the cases that come before it, no promises made by a judicial candidate would be appropriate because cases must be decided on the facts and applicable law regardless of the personal preferences of a judge.

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[50] MISS. RULES OF PROFESSIONAL CONDUCT Rule 8.2(b) (1987).

[51] MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1997).

Judicial candidates also seem to have difficulty complying with the following language of Canon 7(B)(2):

> (2) A candidate, including an incumbent judge, for judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his/her campaign no earlier than 60 days before qualifying deadline and not later than 90 days after last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.[52]

For example, a particular judge addressed a law school ethics class on judicial campaigns and stated that he personally wrote thank you letters to every one of his contributors. When asked if that action was in compliance with 7(B)(2), he replied, "[w]ell, that may be what the Code of Judicial Conduct says, but I can tell you that you will never win an election following that rule." In January 1997, at one of the House of Representatives' committee meetings, a judge was asked whether or not having a big contributor to bring a case before the judge would give the judge cause to question the judge's own impartiality. When the judge explained that under the Code of Judicial Conduct the judge would not know who was a big contributor, there was disbelief on the part of the legislative committee members that anyone would be naive enough to follow those rules.[53] With these kinds of presumptions from elected officials that the rules do not count, little improvement can be expected just by changing to a new set of rules. The problem seems to be one of credibility or accountability which may be addressed by a renewed commitment to abide by whatever rules may be promulgated.

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[52] *Id.* Canon 7(B)(2).

III. VIEWS ON DISPUTED LEGAL AND POLITICAL ISSUES

The Code of Judicial Conduct rules have not been without legal detractors. The most common complaint to the concept addressed in Canon 7(B)(1)(c) has been that it abridges a candidate's First Amendment right of free speech. In 1991, the Kentucky Supreme Court addressed the prohibition of a candidate expressing his views on disputed legal or political issues.[54] Quoting from *Morial v. Judiciary Commission*,[55] the court reiterated that "[t]he state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party or person is entitled to the greatest respect."[56] However, the court found the language of 7(B)(1)(c) to be overly broad and in violation of the First Amendment.

Clark v. Burleigh[57] attacked a limitation on a voter's pamphlet put out by the county which did not allow a candidate to say anything about one's opponent. The pamphlet and its conditions were set out by section 10012.1 of the California Elections Code. The section limits candidate's statements to "a recitation of the candidate's own personal background and qualifications" and prohibits "reference to other candidates for judicial office or to another candidate's qualifications, character or activities."[58] The court discussed the value of "maintaining the integrity and impartiality of the judiciary" and agreed that it is a compelling state interest; however, it found this section

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[53] Kraft II, *supra* note 20, at B1.

[54] J.C.J.D. v. R.J.C.R, 803 S.W.2d 953 (Ky. 1991).

[55] 565 F.2d 295 (5th Cir. 1977)

[56] *J.C.J.D.*, 803 S.W.2d at 956.

[57] Clark v. Burleigh, 279 Cal. Rptr. 333 (Cal. Ct. App. 1991), *reversed on other grounds*, 841 P.2d 975 (1992).

[58] *Id.* at 336.

(but not the similar Code of Judicial Conduct rule which is not before the court for consideration) overly broad and a prior restraint of speech in violation of the First Amendment.

Even so, the court expressed what surely must have been the motivating concerns of the drafters of the election code restriction:

> [J]udicial candidates are different from candidates for legislative or executive office. These differences may justify stricter regulations of the campaign speech of judicial candidates. A judicial candidate should not run on a platform or have an agenda. A judicial candidate should not make campaign promises about how a particular case will be decided. Judges decide cases based upon specific facts; they do not implement broad policies. To the extent that section 10012.1 prohibits this type of speech, it furthers judicial integrity and impartiality.
>
> In addition, although judicial candidates have opinions about disputed issues, those views may not be particularly useful to a judge's role as an impartial arbiter of the law. It is true that judges are not fungible; different judges decide cases differently. Yet by announcing their views during an election, judicial candidates might imply that they have already made up their minds about some issues. Moreover, once those views are revealed, judges could feel compelled to decide cases accordingly.[59]
>
> Nonetheless, we think that section 10012.1 likely furthers the appearance of judicial integrity and impartiality. During an election, candidates may have an incentive to engage in more harmful rhetoric than they otherwise might. Even if such tactics do not affect their ability to decide cases, this behavior would erode the public's confidence in the judiciary. *It is reprehensible to see politicians engage in a scurrilous campaign; it would be even more galling if the candidate was aspiring to judicial office.* The public's faith in the judiciary as an impartial arbitrator of the law could be threatened. The public's

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[59] *Id.* at 339.

> willingness to abide by judicial decrees could also be endangered.[60]

Admitting that restricting campaign speech of judicial candidates may be necessary to preserve the governmental purpose of "'impartial execution of the laws' and to avoid the appearance of 'practicing political justice,'"[61] the California Appellate Court held against the section as it is written. The court asked:

> How could the statute be improved? It could prohibit pledges or promises other than the faithful and impartial performance of the duties of the office. It could prohibit false or misleading statements. Such prohibitions would further judicial impartiality and integrity and the appearance of those qualities and less severely infringe upon speech protected by the First Amendment.[62]

I submit that this case is a case in favor of the language of the Code of Judicial Conduct while calling the California Election Code section not tailored narrowly enough to accomplish the government's compelling interest.

But this case does not end here, as the California Supreme Court reversed the ruling of the Court of Appeals, finding that "[t]he First Amendment does not demand unrestricted access to a nonpublic forum [candidate's statement] merely because use of that forum may be the most efficient means of delivering the speaker's message."[63] The California Supreme Court stated that to use the candidate statement to attack one's opponent would impair the effectiveness of conveying one's factual information and the restriction affects only the candidates' statement not any other channels of communication open to all people.[64] Therefore, the statement limitation was held unequivocally not to violate the free speech guaranty of the First Amendment.[65]

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[60] *Id.* at 340-41 (emphasis added).

[61] *Id.* at 344 (*quoting* Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U. S. 548, 565 (1973)).

[62] *Id.* at 344.

[63] Clark v. Burleigh, 14 Cal. Rptr. 2d 455, 466 (Cal. 1992).

[64] *Id.* at 468.

In the more recent case of *Buckley v. Illinois Judicial Inquiry Board*, the Court of Appeals for the Seventh Circuit held that Illinois Rule 67(B)(1)(c) (which is worded similarly to Mississippi Code of Judicial Conduct Canon 7(B)(1)(c)) violated the First Amendment and therefore could not be enforced against Illinois judicial candidates.[66] The complaint against Buckley was that he circulated campaign literature stating he had "never written an opinion reversing a rape conviction."[67] He was found to have violated the rule, but no sanctions were imposed; therefore, he could not appeal. He filed suit against the Judicial Inquiry Board and the Illinois Judges Association intervened. Buckley's case was consolidated with one brought by Young against the board claiming that fear of being sanctioned by the board kept him from announcing publicly his views on important issues such as "capital punishment, abortion, the state's budget and public school education."[68] Both suits were dismissed by the federal district court after construing the "announce" clause (the candidate is not to "announce his views on disputed legal or political issues")[69] as being limited to statements on issues likely to come before the judge in a case.[70]

On appeal, the Seventh Circuit observed:

> The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election. Indeed, the only safe response to Illinois Supreme Court Rule 67(B)(1)(c) is silence. True, the silencing is temporary. It is limited to the duration of the campaign. But interference with the marketplace of ideas and opinions is at its zenith when the "customers" are most avid for the market's "product." The only time the public takes much in-

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[65] *Id.*

[66] Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993).

[67] *Buckley*, 997 F.2d at 226.

[68] *Id.*

[69] *Id.*

[70] Buckley v. Illinois Judicial Inquiry Bd., 801 F. Supp. 83 (N.D. Ill. 1992).

> terest in the ideas and opinions of judges or judicial candidates is when an important judicial office has to be filled; and in Illinois those offices are filled by election. It is basically only during the campaign that judicial aspirants have an audience, and literal compliance with Illinois Supreme Court Rule 67 (B)(1)(c) would deprive the audience of the show.[71]

It is important to remember that the federal judge who equates voters with the "audience," candidates with the "performers," and the election with "the show," has never had to run for judicial office since he has been appointed for life by the President of the United States.

Judge Posner admitted conflict with the Third Circuit's case *Stretton v. Disciplinary Board*,[72] which upheld almost identical wording in the Pennsylvania rule, but quickly tried to distinguish it and ultimately concluded:

> [T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech. Beyond that valuable generality the cases do not provide much guidance, but they certainly do not support the proposition that to prevent the slightest danger of judicial candidates' making statements that might be interpreted as commitments a state is free to circumscribe their freedom of speech by a rule so sweeping that only complete silence would comply with a literal, which is also so far as appears the intended and the reasonable, interpretation of the rule.[73]

The only other case I have found that deals with the free speech question and finds protection of speech that would violate the Judicial Conduct rule is *In re Kaiser*.[74] In *In re Kaiser*, the court found the candidate's campaign statements that he would be tough on drunk driving, that he was a Democrat, and that his opponent was supported primarily by DWI defense attorneys, constituted improper conduct.[75] The court further found that the prohibitions against such statements were constitutional.[76] However, the court concluded that the candidate's statement regarding the supporters received constitutional protection since the candidate did not know the statement was false.[77]

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[71] *Buckley*, 997 F.2d at 228-29.

[72] Stretton v. Disciplinary Bd., 944 F.2d 137 (3d Cir. 1991).

[73] *Buckley*, 997 F.2d at 231.

[74] *In re* Kaiser, 759 P.2d 392 (Wash. 1988).

There have been challenges to the Code of Judicial Conduct's provisions since its inception in the early 1970's. In *In re Baker*, the court found the judge did not violate the "no pledges or promises of conduct in office other than the faithful and impartial performance of duties of the office" clause.[78] Baker's ads stated that he would be a full-time judge and administer justice without delay, but he was censured for a misrepresentation of fact in other information sent by mail.[79] There was no constitutional attack in this case.

In *Burns v. Valen*, the Minnesota Supreme Court affirmed a decision to dismiss an election contest based on a judicial code violation.[80] The court then stated because there was nothing false or misleading in the candidate's campaign literature, there was no question of censure before the court.[81] The court limited itself to the matter that could invalidate an election.[82] There was no free speech argument in this case.

In *Dowling v. Alabama State Bar*, the Alabama Supreme Court censured a candidate for issuing campaign material which contained information known to be false or in reckless disregard for the truth.[83] In *Dowling*, DR 1-102(A)(4) and DR 2-101(A) of the Code of Professional Responsibility were at issue.[84] The court discussed the constitutionality of the prohibitions and found they were not overbroad, vague, nor a prior restraint of constitutionally protected speech.[85]

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[75] *Kaiser*, 759 P.2d at 401.

[76] *Id.*

[77] *Id.*

[78] *In re* Baker, 542 P.2d 701, 706 (Kan. 1975).

[79] *Baker*, 542 P.2d at 704, 706.

[80] Burns v. Valen, 400 N.W.2d 123, 124 (Minn. 1987).

[81] *Burns*, 400 N.W.2d at 126.

[82] *Id.* at 125-27.

[83] Dowling v. Alabama State Bar, 539 So. 2d 149, 152-53 (Ala. 1988).

In *In re Fadeley*, the Oregon Supreme Court determined that the Code of Judicial Conduct Canon 7(B)(2) was constitutional.[86] However, this case dealt specifically with a free speech challenge to the prohibition against personal solicitation of campaign contributions, not with the "no pledges and promises" provision. It is of interest to note here that the ABA's Model Code of Judicial Conduct was revised in 1990. Although Mississippi has not changed its code to adopt the ABA's changes, we can compare the difference in the wording as we examine the following language of Canon 5 (C)(2) ABA Model Code of Judicial Conduct:

> A candidate shall not *personally* solicit or accept campaign contributions or *personally* solicit publicly stated support. A candidate may, however, establish committees of responsible persons to *conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees* may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [*one*

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[84] *Dowling*, 539 So. 2d at 151-53. The Code of Professional Responsibility states:

> DR 1-102 Misconduct.
> (A) A lawyer shall not: . . .
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> DR 2-101 Publicity.
> (A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102, DR 2-101 (1969).

[85] *Dowling*, 539 So. 2d at 153.

[86] *In re* Fadeley, 802 P.2d 31 (Or. 1990).

> *year*] before the election and no later than [90 days] after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or *others*.[87]

The words in italics differ from the Mississippi Code of Judicial Conduct.[88]

In 1994, the Florida Supreme Court rewrote its Code of Judicial Conduct and included the following language in Canon 7(A)(3):

> A candidate for judicial office:
> (d) shall not:
> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues *that are likely to come before the court*; or
> (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.[89]

Apparently, Florida was attempting to forestall any First Amendment attack on its Code of Judicial Conduct.

In *In re Hopewell*, the South Dakota Supreme Court suspended a candidate from practicing law after an unsuccessful campaign for judge in which he made personal inflammatory attacks on the incumbent judge, accepted campaign contributions, and publicly announced the names of his contributors and the amounts of their contributions.[90] Although Hopewell abandoned his "free speech" argument, the court stated that "the general nature of First Amendment protection [had] been set forth in *Gorsuch* and *Lacey*."[91] The court then spoke eloquently about the need for limitations on judicial campaign tactics:

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[87] MODEL CODE OF JUDICIAL CONDUCT Canon 5(c)(2) (1990) (emphasis added).

[88] MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (1997).

[89] *In re* Code of Judicial Conduct, 643 So. 2d 1037, 1059 (Fla. 1994) (emphasis added).

[90] *In re* Hopewell, 507 N.W.2d 911, 912-13, 918 (S.D. 1993).

> A State may also properly protect the judicial process from being misjudged in the minds of the public. This interest extends to properly conducted judicial elections as the perception of judicial partiality and corruption which can arise from improperly run judicial campaigns, whether true or not, breeds disrespect for the law and ultimately encourages extra-legal self-help. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party or person is entitled to the greatest respect.
>
> A lawyer may engage in political activity and speak as freely as any other citizen. But in a contest between lawyers for a judicial office, a lawyer under his oath and the duties imposed upon him by law has an added responsibility and should seek to maintain a higher standard of conduct than can be expected of one who is not a member of a privileged and a responsible profession. The right of free speech does give a lawyer the right to openly denigrate the court in the eyes of the public.[92]

The *In re Hopewell* court also noted:

> Hopewell's "win at all costs" philosophy was widely reported in the Second Circuit and throughout the state. It could have made a mockery out of what should have been a serious choice by an electorate on a most important decision. Judicial campaigns are not verbal free fire zones, with no rules or laws, save only the law of the jungle. Any candidate for judicial office, incumbent or challenger, who engages in this type of conduct, may find their judicial career involuntarily concluded and their attorney's license in jeopardy.[93]

Also in 1993, West Virginia addressed campaign activities in *In re Codispoti*.[94] This case had a different twist because it was against the candidate's husband, who was a magistrate, and not against the candidate personally. The court found the magistrate "directly, actively and heavily involved in his wife's campaign for circuit judge."[95] This activity included soliciting adverse information on his wife's opponent and misrepresenting the facts in regard to publication of such information. In construing Canon 7(B)(1)(c), the court referred to several cases from other states which had reprimanded judges for such things as "active involvement in son's campaign," "partisan political activity," "actively participating in two election campaigns," and "publicly endorsing a candidate for public office."[96] The West Virginia court upheld the constitutionality of the prohibition, but reduced the censure from one month's suspension to public reprimand because there was no evidence that the magistrate had actually placed the ad which contained the misleading information.

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[91] *Hopewell*, 507 N.W.2d at 917 n.11.

[92] *Id.* at 916-17 (citations omitted).

[93] *Id.* at 917 (citations omitted).

[94] *In re* Codispoti, 438 S.E.2d 549 (W. Va. 1993).

Deters v. Judicial Retirement and Removal Commission, provides a good defense of the prohibition of speaking on disputed political issues.[97] In *Deters*, the candidate, who discussed pro-life issues in his campaign, made a free speech argument, but was unsuccessful. Canon 7B(1)(c) in Kentucky had been amended to read:

> [A candidate of judicial office] should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; *make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court*; or misrepresent his identity, qualification, present position or other facts.[98]

The emphasized language was substituted for "announce his views on disputed legal or political issues," which is the present language of the Mississippi rule. Deters claimed that the new language was substituted as a result of *J.C.J.D. v. R.J.C.R.*[99] and that since abortion would never come before his court there was no violation. The court held that the new language was upheld in *Ackerson v. Kentucky Judicial Retirement & Removal Commission,*[100] and certainly passed constitutional muster.[101] The court concluded:

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[95] *Codispoti*, 438 S.E.2d at 553.

[96] *Id.*

[97] Deters v. Judicial Retirement and Removal Comm'n, 873 S.W.2d 200 (Ky. 1994).

[98] *Deters*, 873 S.W.2d at 202 (emphasis added).

> All of us undoubtedly accumulate some preferences, opinions, biases, and prejudices as we live through our individual life experiences. It is the task of a judge, nevertheless, to make a conscious effort to be as objective as humanly possible in answering the call to be fair and impartial. Justice can hardly be blind if the judge has made a pre-election commitment or prejudgment which causes him or her to apply the blindfold only as to one side of an issue.[102]

The dissent in *Deters* agreed with the finding of the commission's jurisdiction over a losing candidate but challenged the abridgement of speech by the prohibition.[103] The dissenting justice believed that all the arguments in regard to campaign promises could be satisfied by "recusal, voluntary or involuntary, of the judge thought to be offending."[104] While the dissenting justice did not maintain that there could be no restrictions, he concluded "[t]he question must be whether the regulation has been so narrowly designed and strictly applied that a compelling state interest is served without unnecessarily burdening the exercise of free speech."[105] In his view, the strict standard was not met. I propose that a candidate who sees no problem in disregarding the promulgated rules for campaigning will certainly not think to recuse himself in cases involving subjects about which he made campaign promises.

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[99] 803 S.W.2d 953 (Ky. 1991).

[100] Ackerson v. Kentucky Judicial Retirement & Removal Comm'n, 776 F. Supp. 309 (W.D. Ky. 1991).

[101] *Deters,* 873 S.W.2d at 204.

[102] *Id.* at 205.

[103] *Id.* at 205 (Wintersheimer, J., concurring in part and dissenting in part).

[104] *Id.*

[105] *Id.* at 207.

Sometimes the matter of pre-commitment to an issue arises during recusal situations. Probably the most telling arose in the Texas case of *Rogers v. Bradley*.[106] Judge Gammage recused himself from a medical malpractice case in accordance with Rule 18b(2)(a) of the Texas Rules of Civil Procedure because he had been supported by TEX-PAC and he felt that "his impartiality might reasonably be questioned."[107] The court stated:

> The problem is the perception created by a nineteen-minute video produced by TEX-PAC, the political action committee of the Texas Medical Association. A parody of Star Wars entitled Court Wars III, the video was intended to garner support of TEX-PAC's favored candidates for the Texas Supreme Court in the 1992 general election. By analogizing the Texas Trial Lawyers' Association to Darth Vader's evil empire and a "bipartisan coalition of medicine, business, agriculture and industry" to the champions of "fairness, impartiality and reform," the video sought to persuade viewers that the election of certain candidates to the Texas Supreme Court was important in their professional and personal lives. The video urged physicians not only to contribute money, but also to "conduct grass roots efforts . . . ."[108]

The video also showed "slate cards" from former judicial races which revealed that TEX-PAC had sponsored eight of the nine current justices on the Texas Supreme Court, including Justice Gammage. Although Justice Gammage had not participated in the video, nor any campaign it sought to impact, he declared:

> I believe that (1) where a person or entity has sought to engender support, financial or otherwise, for a judicial candidate or group of candidates, and (2) where that effort is made through a medium which is intended to be widely circulated, and (3) where that effort ties the success of the person's or entity's chosen candidate or candidates to the probable result in a pending or impending case, a judge should recuse from

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[106] Rogers v. Bradley, 909 S.W.2d 872 (Tex. 1995).

[107] *Rogers*, 909 S.W.2d at 874.

[108] *Id.* at 873.

> participation in that case under Rule 18b(2)(a). The rule does not require that the judge must have engaged in any biased or prejudicial conduct. Its does require the judge to recuse if "his impartiality might reasonably be questioned," regardless of the source or circumstances giving rise to the question of impartiality and even though the source and circumstances may be beyond the judge's volition or control.
>
> Because I believe a reasonable member of the public at large, knowing all the facts in the public domain, would doubt that the justices portrayed favorably in the TEX-PAC video are actually impartial I recuse myself from participation in all matters related to this cause.[109]

Justice Enoch responded to this declaration of recusal:

> Under the test I apply, a judge would not recuse himself or herself merely because others had engaged in normal, even vigorous, campaign activities. The TEX-PAC video praises some justices, criticizes others, and predicts dire consequences—even as to a specific case—if its chosen candidates do not prevail. It is campaigning of the most raw sort, but it is, after all, campaigning. Any citizen or group that chooses to participate in the political process must be free to support or oppose those seeking office with unrestrained vigor. . . . The portrayal of some candidates as "good" and others as "bad," even in the graphic, pointed analogy of Luke Skywalker versus Darth Vader, is merely the rough and tumble of the democratic process. Regrettably the rough and tumble includes judicial elections.[110]

Justice Enoch continued his discourse by revealing that he supports the practice of appointing judges.[111] He pointed out that 345 out of 485 current Texas judges ran opposed in primary or general elections.[112] In fact, since 1984 every supreme court justice in Texas has had opposition in every election. Unlike

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[109] *Id.* at 874.

[110] *Id.* at 882 (Enoch, J., responding to declaration of recusal).

[111] See generally, 48 SMU L. REV. 723 (1995), where Justice Enoch writes that elections and other forms of political control are compromises of the Constitution's judicial role that should be made only to further some distinct goal.

[112] *Rogers*, 909 S.W.2d at 882 n.1.

Mississippi, where justices who had opponents in the 1996 elections retained their seats,

> five of the eleven [Texas] justices who sought to retain their office by election between 1986 and 1992 were unsuccessful; another justice left office when, at the end of his term, he was defeated in his effort to unseat [the chief justice] and two other justices chose not to seek re-election. Since 1988, *over fifty million dollars* has been raised to finance Texas appellate judicial elections.[113]

Judge Enoch stated, "[w]hile I consider such third party activities to be troublesome, and I fear growing acceptance of this type of campaigning bodes ill for the traditional notion of an independent judiciary . . . it cannot affect recusal."[114] He then chided the legislature for not solving the problem by adding:

> For candidates and their supporters alike, the fine line of conducting a campaign which draws public interest and attention without eroding public confidence in judicial neutrality is hard to hew. But, as we expect citizens to be knowledgeable about the political realities of judicial elections, we must expect them to know where that line should be drawn.[115]

IV. THE SOLICITATION OF CAMPAIGN FUNDS

Recusal based on financial backing of a candidate leads to a discussion of judicial solicitation of campaign funds. For example, in *In re Hebbeler*, the Missouri Court of Appeals considered a judge's failure to recuse himself after he solicited campaign contributions from parties' attorneys during trial and held that the judge was not obligated to recuse.[116] The court stated that although the letter over the judge's signature which went to all members of the bar appeared to be a violation of Canon 7, which they did not condone, the present case involved a recusal motion that was filed after the verdict and long after the party had notice of the solicitation.[117]

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[113] *Id.* at 882 n.1. (emphasis added).

[114] *Id.* at 883.

[115] *Id.* at 884.

[116] *In re* Hebbeler, 875 S.W.2d 163, 168 (Mo. 1994).

The Mississippi Supreme Court has twice addressed campaign funding. First, in *In re Baker*, the judge solicited a campaign contribution from a litigant during the pendency of a petition for modification, but while the petition for modification had been continued until after the election.[118] The judge was censured not for personally soliciting, but because of a personal telephone call which raised the specter of influence peddling.[119] *In re Baker* arose in a disciplinary context. The second case, *Jenkins v. Forrest County General Hospital*, involved a plaintiff's motion for recusal.[120] The brother of a judge was a member of the law firm that represented the hospital, and prior statements of the judge that the medical profession was responsible for his election brought into question the impartiality of the judge. The court found that although such a statement acknowledging support by the medical profession might show bias, in the interim the judge had run for re-election, and the passage of time had removed any purported duty to medical personnel that might have been inferred from the judge's acknowledgement.

Other cases which have spoken directly to allegations of misconduct based on solicitation or receipt of funds do not seem to challenge the authority of the prohibition but rather deal with discipline for violating it. In *In re Mendez*, the candidate pled guilty to receipt and expenditure of illegal cash contributions during his 1988 election campaign in violation of a West Virginia law which prohibited receiving cash contributions of over fifty dollars.[121] Mendez pled guilty to the charge of receiving $5000 in cash, resigned from office, and paid the fine of $15,000. The Judicial Investigation Commission of West Virginia then brought an action for discipline under Canon 7(B)(2).

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[117] *Hebbeler*, 875 S.W.2d at 167.

[118] *In re* Baker, 535 So. 2d 47, 49 (Miss. 1988).

[119] *Baker*, 535 So. 2d at 52.

[120] Jenkins v. Forrest County Gen. Hosp., 542 So. 2d 1180 (Miss. 1988).

[121] *In re* Mendez, 450 S.E.2d 646, 647 (W. Va. 1994).

The court held that Canon 7(B)(2) was clear and unambiguous and fined Mendez $1000 plus costs and ordered him publicly censured.[122]

It is surprising that the West Virginia court would come down so hard on a judge under Canon 7(B)(2) since they all but exonerated two judicial candidates who personally received unsolicited campaign funds in a 1989 case. In *In re Karr*, neither of the candidates set up campaign finance committees.[123] The court stated that it had never addressed a complaint based on 7(B)(2). Karr claimed that it did not apply to him because he had no opponent in the primary.[124] McCarty cited recent criticisms to Canon 7 as his reason for non-compliance.[125] The court responded: "Whether those criticisms serve as an accurate assessment of the Canon's weaknesses is irrelevant to this proceeding. This proceeding is concerned with whether Canon 7(B)(2), as written, was violated by the respondents. Thus, our decision in this proceeding is limited to such determination."[126] The court then discussed other jurisdictions' cases which have upheld the prohibition and have cited Canon 7 as a means of protecting candidates from being influenced by campaign contributions and of insuring that pressure may not be brought on lawyers by an incumbent judge seeking re-election. The court admonished both candidates.[127]

However, in 1993 the West Virginia Bar suspended a lawyer for failure to report that a judge had extorted money from him.[128] The judge was later disbarred when he was convicted of a federal felony.[129] Although the *Hobbs* and *Grubbs* cases do not construe Canon 7, the *Hobbs* case shows that professional discipline is not automatic, even in the case of serious professional misconduct. Although the majority believed paying extortion warranted disbarment, the fear factor of a powerful political boss like Judge Grubb mitigated the punishment to a two year suspension.[130] One dissenting justice stated that Hobbs was a victim of an extortionist and that a ninety day suspension adequately punished the young lawyer without injuring his career for life.[131] The other dissenting justice (the Chief Justice) felt the profession had been dealt a near fatal blow by not disbarring a judge briber.[132] Each opinion was well articulated, but diametrically opposed to the other two. Lawyer discipline is thorny at best, and judicial discipline seems to be even more difficult to fashion.

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[122] *Mendez*, 450 S.E.2d at 649.

[123] *In re* Karr & McCarty, 387 S.E.2d 126 (W. Va. 1989).

[124] *Karr*, 387 S.E.2d at 127 n.4.

[125] *Id.* at 127-28 n.5.

[126] *Id.*

[127] *Id.* at 129.

[128] Committee on Legal Ethics v. Hobbs, 439 S.E.2d 629, 630 (W.Va. 1993).

[129] Committee on Legal Ethics v. Grubb, 420 S.E.2d 744, 797 (W.Va. 1992).

The time limitation placed on judicial campaign fund solicitation was struck down in the case of *Zeller v. Florida Bar.*[133] The Code of Judicial Conduct had limited the period to twelve months before the general election, but the *In re Code of Judicial Conduct* court deleted the time limitation to conform with the ruling in *Zeller.*[134] The Mississippi rule, on the other hand, limits solicitation of funds to sixty days before the qualifying deadline and ninety days after the last election in which a candidate participated.[135] In Mississippi, most judgeships are determined by general election, but a runoff election is held two weeks later if a candidate fails to receive a majority of the votes.[136]

Perhaps the strangest case in recent history dealing with campaign funds is an unpublished case in Texas.[137] In *Howell*, a candidate sued the Texas Trial Lawyers Association for reneging on their promise to raise $450,000 if he would run against an incumbent justice of the Texas Supreme Court. He ran and they made only minimal efforts to raise campaign funds. In bringing suit, "Howell sought damages consisting of the salary of the office, damage to his reputation exceeding the value of the salary of the office, and punitive damages based upon the conduct's being willful. Howell filed the suit one week prior to the 1994 Republican primary in which he was a candidate."[138] The majority granted a summary judgment as a matter of law. The justice who concurred in part and dissented in part agreed that summary judgment should lie, but for the reason that the Texas Trial Lawyers Association "is prohibited by the Texas Election Code from making political contributions to a candidate and, thus, any agreement based on such a promise is illegal and unenforceable (citation omitted)."[139] This justice affirmed TTLA's summary judgment motion on the defense of illegality. Only in the concurring opinion did the court ever address the judicial ethics issue.[140] However, the court did not mention the language in regard to campaign contribution solicitation, but instead tailored the argument to contract law by stating that there was a lack of consideration (TTLA would raise funds if candidate would run). The court also stated that if the promise to raise funds if the candidate agreed to run were adequate consideration for a promise, such a promise would be unenforceable as against public policy.[141]

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[130] *Hobbs,* 439 S.E.2d at 633.

[131] *Id.* at 638 (Neely, J., dissenting).

[132] *Id.* (Workman, C.J., dissenting).

[133] Zeller v. Florida Bar, 909 F. Supp. 1518, 1529 (N.D. Fla. 1995).

[134] *In re* Code of Judicial Conduct, 659 So. 2d 692, 693 (Fla. 1995).

[135] MISS. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (1997).

[136] MISS. CODE ANN. § 23-15-981 (1972 & Supp. 1997).

[137] Howell v. Texas Trial Lawyers Ass'n, No. 05-94-01423-CV, 1996 WL 50603, at *1 (Tex. App. Dallas Jan. 31, 1996).

The Ohio Supreme Court reviewed an action of the Commission of Judges for violation of the Code of Judicial Conduct in regard to solicitation of funds by Cathleen Carr.[142] Carr was alleged to have knowingly misrepresented the qualifications of her opponent and to have personally solicited campaign funds by signing a fundraising letter. The point at issue was the newly mandated expedited procedure to handle campaign violations. However, since Carr could not get a continuance and did not appear at the hearing the court had no choice but to enter an order affirming the finding of violation by the Commission.[143] The concurring opinion objected to the balancing test used by the majority and advocated a bright line rule that a hearing scheduled in accordance with Governing Judicial Rule II(5) satisfies due process.[144] The dissent argued that the complaint was not established by clear and convincing evidence and should have been dismissed.[145] So, there you have it. Evidence and procedure were given center stage, with ethics barely showing up in the wings.

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[138] *Howell*, 1996 WL 50603, at *1.

[139] *Id.* at *7 (Legarde, J. concurring in part and dissenting in part).

[140] *Id.* at *15 (Wright, J., concurring).

[141] *Id.* at *16 (Wright, J., concurring).

[142] *In re* Judicial Campaign Complaint Against Carr, 667 N.E.2d 956 (Ohio 1996).

In the Florida case of *MacKenzie v. Super Kids Bargain Store, Inc.*, there was a convoluted discussion of the need to recuse oneself if the litigant's attorney had contributed $500 to the judicial campaign of the judge's husband.[146] The majority said: "Judicial campaigns and the resultant contributions to those campaigns, therefore, are necessary components of our judicial system."[147] And quoting from *Buckley v. Valeo*,[148] the court stated:

> The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
>
> However, we find that Florida's Code of Judicial Conduct together with Florida's statutory limitation upon campaign contributions and the requisite public disclosure of such contributions, provide adequate safeguards against the above-identified concerns regarding contributions to constitutionally mandated judicial campaigns and render the ground alleged in the motions at bar legally insufficient when presented as the sole ground for disqualification.[149]

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[143] *Carr*, 667 N.E.2d at 958-59.

[144] *Id.* at 959 (Cook, J., concurring).

[145] *Id.* at 959 (Resnick, J., dissenting).

[146] MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990).

[147] *MacKenzie*, 565 So. 2d at 1335.

[148] 424 U.S. 1, 26-27 (1976).

[149] *MacKenzie*, 565 So. 2d at 1335-36.

The limitations provided by § 106.08 of the Florida statutes limit individual and PAC contributions to $1000 for county or circuit judges, $2000 for retention as a judge on the district court of appeals, and $3000 for retention as a justice of the Supreme Court.[150]

Hidden in the midst of opinions in *MacKenzie* is the following one paragraph specially concurring opinion:

> I agree with the majority and with Justice Kogan's concurring opinion suggesting that alternatives should be found to address the issues presented in this case. *I write only to add that merit-retention elections requiring judges to solicit campaign funds are subject to the same concerns as those presented here. Therefore, although merit retention improves the situation, it is not the answer to the problem.*[151]

What, then, pray tell, is the answer? Apparently, opinion makers in Mississippi believe that adoption of the Missouri Plan is the answer. The Missouri Plan as first advocated by the American Judicature Society[152] is a plan whereby the governor makes the initial judicial appointments based on recommendations from a screening committee made up of lawyers and laymen. After a period of time, those appointees must run in a retention election without announced opponent candidates. The question on which the electorate must vote is: "Shall Judge ______ be retained in office?" "Yes" or "No" are the only alternatives for voters. Until recent years, retention elections have largely gone unnoticed by the electorate. The state's judicial disciplinary commission is available for discipline or removal if a judge's activities in office need correction but are not such that impeachment would be necessary. As illustrated in a 1996 American Bar Association Journal article,[153] retention elections have become the forum for ideological debate into which the candidate, by the Code of Judicial Conduct, is prohibited from entering. Some writers have advocated that the Code of Judicial Conduct be amended to eliminate that prohibition to allow the "free for all" that campaigns spawn.[154] I, on the other hand, advocate enforcement of the rules already on the books.[155]

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[150] *Id.* at 1336.

[151] *Id.* at 1340 (Barkett, J., concurring specially) (emphasis added).

[152] Merit Selection: The Best Way to Choose the Best Judges, <http://www.ajs.org/select2.html>.

[153] Gibeaut, *supra* note 23.

V. METHODS OF JUDICIAL SELECTION

Perhaps the best recent discussion of judicial selection and retention comes from a thesis written by Judge Peter D. Webster of the Florida First District Court of Appeal in partial fulfillment of the requirements for the degree of Master of Laws in The Judicial Process at the University of Virginia.[156] Judge Webster discusses the four American methods of judicial selection: appointment, partisan elections, non-partisan elections, and "merit" plans (appointment plus retention election). Judge Webster confirms the reality that regardless of the statutory selection scheme of the state, the majority of judges enter the judiciary by appointment to fill unexpired terms.[157]

A. *Appointment*

Appointment, he says, is advocated because lawyers who would make great judges may not become judges because they have no stomach for political campaigning. By this method, lawyers need only apply and be evaluated on their resumes and interviews to receive appointments. Proponents argue that there is still accountability to the voters because appointments are made by the governor, who is directly elected by the people. It is further argued that minorities and women fare better in the appointive method.[158] It is true that in Mississippi, the "first" woman and African-Americans were appointed,[159] but the 1994 elections resulted in fifteen women and eighteen African-Americans having been elected to judicial posts from the Court of Appeals down to County Court.[160]

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[154] *Id.* at 55.

[155] *See infra* notes 180-85 and accompanying text.

[156] Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1 (1995).

[157] *Id.* at 12.

[158] *Id.* at 15.

[159] Zelma Price, County Court Judge, Washington County; Lenore Loving

B. Partisan Election

Partisan elections are held in only eight states.[161] Mississippi has become a non-partisan election state with the passage of the Non-Partisan Judicial Election Act.[162] Partisan elections are claimed to be the most politically-driven judgeships, purportedly ensuring the highest degree of judicial accountability.[163] However, it should be noted that the party primaries held in June 1994 after the passage of the non-partisan judicial election law,[164] but before its preclearance by the Justice Department, showed an abysmal statewide turnout with only 357,405 voting in the first primary and less than a third of that number voting in the second.[165] In the general elections, the numbers were much larger with a voter turnout of 1,228,404.[166] One of the most difficult aspects of a judicial race (partisan or non-partisan) is creating enough interest so that the voters will remember to vote on election day.[167] In Mississippi, for many years judicial elections have been held in years when members of Congress are elected so that judges need not be embroiled in partisan state political races.[168]

Prather, Chancery Court Judge and Supreme Court Justice; Reuben Anderson, Supreme Court Justice.

[160] Miss. Trial & Appellate Judges Directory, Miss. Judicial College (1995) (Supreme Court Justices Prather (female) and Banks (African-American) are not included as they were elected in 1992 and 1996 respectively. Note also, the total is less than thirty-three because some of the women are also African-American).

[161] Webster, *supra* note 147, at 17.

[162] MISS. CODE ANN. §§ 23-15-974 to -985 (1972 & Supp. 1997).

[163] Webster, *supra* note 147, at 17.

[164] MISS. CODE ANN. §§ 23-15-974 to -985 (1972 & Supp. 1997).

[165] Public Records of Secretary of State of Mississippi, Results of Elections, June 1994.

[166] Public Records of Secretary of State of Mississippi, Results of Elections, Nov. 1994.

[167] Kraft I, *supra* note 6, ("Bridges said the biggest hurdle for the Nov. 19 runoff is drawing voter interest. Turnout will be much smaller than Tuesday's presidential election.").

[168] MISS. CODE ANN. § 23-15-1015 (Supp. 1990) (trial judges); MISS. CODE ANN.

Webster cites the drawbacks of these types of elections (primary races followed by general election) as follows:

> Assuming for purposes of argument that periodic contested elections do have some impact on judicial accountability, an assumption as yet unproven empirically, the question remains whether the degree of additional accountability attained as a result of those elections is worth the price. Contested elections are expensive and they are becoming more expensive every day. Moreover, in large states, they have become extraordinarily expensive.[169]

My own research affirms that statement. In 1992 in the state of Washington, Elaine Houghton spent $384,000, including $321,000 of her own funds to gain name identification in the primary election for the Washington Supreme Court. Her opponent, Seattle Municipal Judge Barbara Masden, raised just over $40,000, including $20,000 of her own money and $10,000 from her father.[170] The Alabama statistics are equally as exorbitant.[171] The Texas experience referred to in Justice Hawkins's address is a cause for alarm.[172] Webster adds, "It is not merely the rapidly escalating cost of such elections that produces concern. One must also consider where the money comes from, and the perceptions created by such fundraising activities."[173]

C. Non-Partisan Elections

The third type of judicial selection, non-partisan elections, is criticized for "possess[ing] all of the vices of partisan elections and none of the virtues."[174] Webster cites to the 1988

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§ 9-4-15 (Supp. 1991) (court of appeals judges); MISS. CODE ANN. § 23-15-993 (Supp. 1990) (supreme court justices).

[169] Webster, *supra* note 147, at 19 (citations omitted).

[170] Peter Lewis, *High-Court Candidate Turns It Into a High-Priced Contest,* THE SEATTLE TIMES, Oct. 31, 1992, Northwest, at A16.

[171] Hawkins, *supra* note 1.

[172] Hawkins, *supra* note 1.

[173] Webster, *supra* note 147, at 20.

[174] Webster, *supra* note 147, at 26.

Ohio Supreme Court elections where $2.8 million was spent, over $1.7 million of which was spent by the losing candidates.[175] Webster claims that there is an appearance that "justice is for sale," in non-partisan as well as partisan elections.[176] In the 1994 Mississippi Court of Appeals non-partisan races, only Judge Barber had not been on the ballot in the primaries. Judge Southwick had been unopposed in the primary. The other eight ran in both partisan and non-partisan races in 1994.

D. The Merit Plan

The "merit" plan, according to most advocates, "removes politics from the process of selecting judges."[177] Attorney Louis A. Fuselier of Jackson, representing the American Judicature Society and the Mississippi Economic Council, expressed this sentiment in his appearance before the House Judiciary Committee on December 12, 1996.[178] Variations on this theme have been given by letters and editorials in *The Clarion-Ledger*.[179] Justice Mike Mills, fresh off the campaign trail, testified before the Senate Judiciary Committee on December 13, 1996. In a letter to all appellate judges transmitting the outline of his remarks, Justice Mills expressed his own concerns:

> I am deeply concerned about the effect that various special interest groups, including very wealthy trial lawyers, have on the outcome of our elections. I ask you to truly consider these problems and think unselfishly, with an eye to the future, about how we can become more independent, not from the Executive Branch or the Legislature, but from the various interests which seek to influence our decisions.[180]

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[175] Webster, *supra* note 147, at 27.

[176] Webster, *supra* note 147, at 27.

[177] Webster, *supra* note 147, at 31.

[178] Kraft II, *supra* note 20.

[179] *Our Views, Court Races: Judicial Races Headed for Sleaze Pit*, CLARION-LEDGER (Jackson, Miss.), Nov. 10, 1996, at 4G; *Our Views, Judges: Support is Growing for Appointment*, CLARION-LEDGER, (Jackson, Miss.), Jan. 19, 1997, at 4G; Wallace Dabbs, *Mississippi Could Have Appointed Judges and Still Get to Vote, Too*, CLARION-LEDGER, (Jackson, Miss.), Jan. 30, 1997, at 9A.

[180] Memorandum from Justice Mike Mills to Appellate Judges, Dec. 13, 1996

Justice Mills identified the "players in today's judicial elections" as 1) business interests, 2) wealthy trial lawyers, 3) law enforcement and 4) other special interest groups. In the Mississippi Supreme Court central district race where the incumbent Dan Lee was retiring, a contrast can be seen between the winner, Bill Waller, Jr. who raised $252,870 and whose list of contributors was eleven (double column) pages long, and another contender who raised over $100,000 but whose list of contributors (mostly PACs each contributing several thousands of dollars) was only one page long.[181] Any campaign finance committee finds at best that money is hard to raise, but it takes much less effort if the pockets of the contributors are deep. Elections are expensive whether they are initial, like the Waller election, or retention, like the re-elections of Mills, Banks, and Pittman. In my view, the Missouri merit plan does not begin to touch the election finance problems facing Mississippi.

VI. ARE THERE ANY SOLUTIONS?

Judge Webster presents one solution and the Mississippi Bar has discussed other solutions to the problems of judicial elections. We will examine them all. Webster would have a separate nominating and retention commission for the supreme court, the court of appeals, and trial court districts (to include county courts), to assure that members of the commission would be "chosen from a geographic area coextensive with the jurisdiction of the court in question."[182]

There would be nine members plus a chair on each commission. Three would be chosen by the governor, three chosen by a leader in the Senate of a party opposite to that of the governor, and three chosen by the state bar. The chair of each of the commissions would be as follows: a judge chosen by the chief justice of the Mississippi Supreme Court. Limitation on

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(on file with author).

[181] Public Records of the Mississippi Secretary of State, *supra* note 3.

[182] Webster, *supra* note 147, at 39 n.283.

appointments would be: no more than five of the nine will be from the same political party; no more than five of the ten will be lawyers; at least one of the three chosen by each entity (governor, legislator, bar) will be a racial minority or a woman; and all must be qualified electors from the territorial jurisdiction of the court in question.[183] Once appointed, each would serve for six years and not be eligible for judicial appointment until more than two years after service on the commission. Initially, the terms would be staggered to insure continuity of the commission.

The commission would recommend three names for each vacancy in order of its priority. The governor would have to appoint one of them within sixty days. If the governor chose someone other than the first choice of the commission, the governor would "be required to explain to the public the reasons for the choice."[184] After two years, if the judge desired to continue on the bench, the judge would give notice in writing of that desire. If the commission determined that the judge's performance was satisfactory for the first two years, the judge would be reappointed for a ten year term. If the commission determined that the judge's performance was deficient, however, a vacancy would be declared and the process would begin again.

Webster has built two safeguards into his proposal: 1) the commissions would be well funded so that a full-time investigator would be retained for each commission to help with background and performance checks; and 2) recall elections could be had on voter petitions. This whole plan would be in the context of an available judicial disciplinary agency whose proceedings are public.[185] Webster, while acknowledging that this will not satisfy everyone's concerns, states: "[I]t will eliminate entirely the offensive elements of judicial elections; and it will, in all likelihood, increase the public's respect and support for the judiciary as an institution."[186]

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[183] Webster, *supra* note 147, at 39-40.

[184] Webster, *supra* note 147, at 41.

[185] Webster, *supra* note 147, at 41.

Since I remain unconvinced that these commissions will be any smarter or freer of bias than the majority of the voting electorate, I must address the Mississippi Bar's suggestions. For several years, prior to my deciding to run for the judiciary, I served on a bar committee chaired by Professor Judith Johnson of the Mississippi College School of Law. In 1993, we developed a recommendation to be used in regard to appellate judicial elections because those are the ones that cover such a wide territory with expensive media usage. It was a bar committee responsibility to investigate claims of violations of the Code of Judicial Conduct during the campaign process. There would be an eleven person committee composed of three judges, four lawyers and four laypersons, appointed by the President of the Bar for staggered three year terms. The committee could act on its own initiative; but if a written complaint is filed by a candidate about the actions of another candidate or person acting on behalf of that candidate, the committee must immediately contact the alleged offender to see if he or she will admit or deny the complaint. If it is denied, then a hearing is had to determine whether or not a violation occurred. All of the proceedings would be confidential and if anyone "leaked" information before a determination is made, there would be censure, whether or not there is an actual violation.[187] If it is determined that an unfair practice was committed, the committee may determine an appropriate remedy, including but not limited to a public statement by the committee about the infraction, a public retraction of the statement by the offending candidate, a reference to the small group knowing of the statement (if it is of limited knowledge) or a formal complaint with the bar or (if the candidate is elected in the meantime) the commission on judicial performance.

Two things make this a workable solution: 1) complaints are handled immediately without having to wait for the next quarterly meeting, and 2) the procedure is entirely voluntary.

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[186] Webster, *supra* note 147, at 42.

[187] Recommendations of the Judicial Selection Committee (on file with author).

The candidate does not have to sign the covenant agreeing to be bound by the oversight of the Fair Campaign Practices Committee, but the names of those who do and who do not sign the covenant will be made public by the committee after the qualifying deadline. All candidates are bound to observe the Code of Judicial Conduct, but this is just a focused "signature on the dotted line" reminder and an agreement to submit to discipline if found to be in violation. Although the board of bar commissioners did not adopt this recommendation in 1994, the January 1997 Mississippi Bar Forum considered the concept in its discussions.[188]

In 1993, the Judicial Selection Committee also recommended having a seminar where all media representatives were invited to help them understand how judicial elections differed from legislative and executive elections so that they would know the focus of such elections and help the candidates to cooperate with the media better. That recommendation became the project of another committee, and I am unaware of its present status.

Out of the Bar Forum, however, came an idea that certainly would fit well with the voluntary commitment to speedy candidate discipline addressed above. It was described in the Forum's Recommendation No. 6:

> That the Bar, the Office of the Secretary of State, or other appropriate entity, prepare and produce a pre-election seminar, under the auspices of the Mississippi Supreme Court, which each judicial candidate and his/her finance chairperson be required to attend. The purpose of such seminar is to inform the candidates and finance chairpersons of applicable laws and canons governing the conduct of elections and campaign financing, of reporting requirements, and of penalties imposed for violations thereof.[189]

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[188] Clark, *supra* note 22.

[189] Clark, *supra* note 22.

CONCLUSION

What do I think is the solution? It is obvious that the proposed solutions are not panaceas. I believe that the solution is rooted in two things: 1) integrity of the candidates, and 2) education of the electorate. No rules will insure observance. The people to whom the rules apply must have the integrity and commitment to abide by them, not basing their actions on those of their opponents. We do that each year with the Internal Revenue Code. We voluntarily pay our taxes whether or not anyone else does. Eventually sanctions may be applied for refusal, but only a tiny minority of persons disregard the claims of the IRS. The Code of Judicial Conduct should be the same, only more so, because we are a profession. Second, the public needs to be educated as to what one should expect from a judicial officer — fair and impartial decisions based on the law and the admissible evidence in a trial — not some decisions determined by a particular agenda.

On November 3, 1996, three days before the general election, an editorial bemoaned the dangerous trends of politicization of the Supreme Court. Some of their noteworthy statements were:

> Voters should beware of any candidate who makes appeals on controversial issues, is promoted by special interests or makes veiled partisan comparisons. . . .
> The [lobbying] group has every right to promote its ideas in the political arena, but that arena should not include the judiciary. We should not want pro-business judges any more than we want pro-plaintiff, or pro-environment or pro-anything.
> Judges should only be *pro-law. The law is a judges only constituency. . . .*
> We make no recommendations for particular candidates, but voters should put serious stock in how they have conducted their campaigns. There should be no political litmus tests. *Voters should want a justice who exhibits fairness, independence and dignity.*[190]

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[190] *Supreme Court, Vote for Independence and Dignity,* CLARION-LEDGER (Jack-

The only problem with their rhetoric is that their simplistic solution is appointment followed by retention elections which have proven to have most of the same problems as any other elections —-particularly the high cost factor.

One thing we can all agree with is a statement in a January 30, 1997 editorial: "Those in high judicial positions should set examples and be public spokespersons for the highest standards in judicial campaigns."[191] I intend to continue to campaign by the spirit as well as the letter of the Code of Judicial Conduct, and I am expecting all other judicial candidates in 1998 to do the same. We have already seen what can happen when it is disregarded. No candidate can turn over his/her ethics to a campaign specialist who may not know how different a judicial race is from that of all other political races. In judicial races the buck stops and starts with the candidate.

Justice Pittman stated at his swearing-in ceremony in January, 1997, that when he entered service at the Mississippi Supreme Court, there were justices there who had come by way of appointment and some who had come by the polls, but that when they served together there was no difference in the service nor the competence.[192] Judge Webster agrees: "Empirical work suggests that the method of selection has little, if any, effect upon the overall quality of judges."[193] It appears that judges rise to the occasion when they ascend to the bench, and the method used to get them there is inconsequential in determining their effectiveness.

While not discussing methods of selection of judges, I believe that Mr. Justice Tom Clark, retired justice of the United States Supreme Court was right when he gave this description of a good judge:

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son, Miss.), Nov. 3, 1996, at G4.

[191] *Judicial Reform, Leadership Must Come from Court,* CLARION-LEDGER (Jackson, Miss.), Jan. 30, 1997, at A8.

[192] Justice Edwin L. Pittman, Remarks at Old Supreme Court Chambers, New Capitol, Jackson, Miss., Jan. 6, 1997.

[193] Webster, *supra* note 147, at 15.

> Judicial independence, of course, has its corollary of judicial responsibility. The judges must be of the stuff that goes to make a good judiciary. What is this stuff of which I speak? Legal Knowledge? Yes, and of sufficient quality to be able to determine the applicable rule of law in a given case together with the wisdom to apply it with clarity and dispatch. Ability to discover the facts? Yes, and an open mind to recognize the truth and separate it from the chaff. A firm but understanding heart? Yes, and the courage to declare a just decision and enforce it. Integrity? Yes, above all other attributes; and a public and private deportment that is above reproach. A conscience? Yes, but rather than being one that breeds fear and negative action it must be a conscience which at the close of each day's work may whisper softly: "Today you were truly worthy to wear the robe and enjoy the appellation of judge." To maintain such a status in the public mind judges, like Caesar's wife, must live above suspicion.[194]

With cooperation from the candidates, the contributors, the bench and bar, the media, and the voters, I would hope that the judicial elections in 1998 will be Mississippi's finest hour.

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[194] Tom C. Clark, *Judicial Self-Regulation—Its Potential,* 35 LAW & CONTEMP. PROBS. 37, 38-39 (1970).

ENFORCING SECURITY INTERESTS IN PERSONAL PROPERTY IN MISSISSIPPI

W. Rodney Clement, Jr.[*]

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I. INTRODUCTION

The purpose of this article is to collect and organize cases that address enforcement of security interests in tangible personal property under Mississippi law, particularly Mississippi's version of Article 9 of the Uniform Commercial Code.[1] The many issues that arise in creating and perfecting security interests, determining priorities among security interests in the same collateral, and enforcing security interests in intangible property are beyond the scope of this article. This article does not purport to be a comprehensive guide to all issues that may arise in enforcing security interests in tangible personal property, but focuses on those issues which have been addressed by courts applying Mississippi law.[2] Cases from other states have been used to fill gaps when there are no reported cases applying Mississippi law on a particular issue and to compare holdings in Mississippi cases to those in other states. This article also compares Mississippi law to some of the proposed revisions to Article 9.[3]

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[1] The Uniform Commercial Code (U.C.C.) was enacted in Mississippi in 1966 and became effective on March 31, 1968. 1966 Miss. Laws Ch. 316.

[2] For a comprehensive treatment of this subject, readers are directed to one

II. Secured Party's Option to Proceed on Indebtedness First

Mississippi does not have a "one-action" or "collateral first" rule. Instead the secured party usually will attempt to collect its indebtedness by foreclosing on its collateral and then proceeding against the debtor in circuit court for the remaining balance on the promissory note in a deficiency action. But absent agreement to the contrary with the debtor, the secured party is not required to attempt to collect its indebtedness from the real or personal property collateral first.[4]

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of the many excellent treatises on the U.C.C. and Article 9. *See, e.g.*, Ronald A. Anderson, Uniform Commercial Code (3d ed. 1981 & Supp. 1997); Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code (1993 & Supp. 1997) [hereinafter Clark, Secured Transactions Under the UCC]; William D. Hawkland et al., Uniform Commercial Code Series (1997); Thomas M. Quinn, Uniform Commercial Code Commentary and Law Digest (2d ed. 1991 & Supp. 1997); James J. White & Robert S. Summers, Uniform Commercial Code (4th ed. 1995 & Supp. 1997) (Practitioner Treatise Series).

[3] A drafting committee established by the American Law Institute and the National Conference of Commissioners on Uniform State Laws expects to complete work on proposed revisions to Article 9 in early 1998. *See* Steven O. Weise, *U.C.C. Article 9: Recent Developments*, 52 Bus. Law 1591, 1591 (1997). All references in this article to the "Draft" are to the January 1988 draft of Revised Article 9 which can be viewed at http://www.law.upenn.edu/library/ulc/ucc9/ucc9198.htm. All prior and subsequent drafts can be viewed at http://www.law.upenn.edu/library/ulc/ulc.htm.

[4] *See* West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241, 242 (Miss. 1986) (holding that mortgagee not required to foreclose on deed of trust before proceeding with action on note); Cooper v. Mississippi Land Co., 220 So. 2d 302, 308 (Miss. 1969) (holding that under pre-Code law secured party could sue on note without regard to personal property security).

A. Action on Note

The secured party may bring an action on the note, obtain a judgment against the debtor, and execute upon its collateral or other property of the debtor.[5] Obtaining a judgment against the collateral may be advantageous for the secured party if the debtor has other unencumbered and nonexempt property or if some problem exists with the secured party's security documents. The priority of the judgment will relate back to the date that the secured party perfected its security interest in the collateral.[6] When the sheriff executes upon a judgment, the secured party does not have to worry about complying with the notice and amorphous "commercially reasonable" requirements that apply when the secured party forecloses on collateral and sells it.[7] In addition, although the secured party cannot purchase the collateral at a private sale, the secured party can purchase the collateral at an execution sale.[8]

Mississippi's version of the Uniform Commercial Code provides the statute of limitations for negotiable notes. The statute of limitations on an action to enforce a negotiable note payable on a fixed date is six years from that date.[9] In the case of installment indebtedness, the statute of limitations as to each installment begins to run on the date the installment is due.[10] The statute of limitations on a negotiable demand note is six years from the date of demand, or if no demand is made, ten years from the date of the note.[11] If a negotiable note contains a provision that it is payable on demand but will be payable on a fixed date if no demand is made, the statute of limitations begins running on the fixed date until demand is made.[12] The statute of limitations for a non-negotiable note is the general three-year statute of limitations rather than six years.[13] The statute of limitations for a non-negotiable demand note is three years from the date of execution,[14] unless the parties to the note clearly intend that an actual demand will be made, in which case the statute of limitations begins to run from the date of demand.[15]

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[5] *See* MISS. CODE ANN. § 75-9-501(1) (1981) (providing that secured party can reduce claim to judgment); Avco Fin. Serv., Inc. v. Christiaens, 652 P.2d 220, 222 (Mont. 1982) (holding that secured creditor may obtain judgment on other property of debtor prior to disposal of debtor's collateral); Stewart v. Henning, 481 N.W.2d 230, 232 (N.D. 1992) (noting creditor may obtain judgment on underlying debt first). Section 75-9-501 conforms to the official text of the Uniform Commercial Code *See* U.C.C. § 9-501, 3B U.L.A. 10 (1992) (stating that secured creditor not required to possess and dispose of collateral before obtaining judgment on other property).

[6] *See* MISS. CODE ANN. § 75-9-501(5) (1981); *see, e.g.*, Rural Gas, Inc. v. Shepek, 469 P.2d 341, 343 (Kan. 1970); North Carolina Nat'l Bank v. Sharpe, 241 S.E.2d 360, 361 (N.C. Ct. App. 1978); *In re* Schindler, 16 U.C.C. Rep. Serv. (Callaghan) 252, 253 (Bankr. E.D. Pa. 1974) (applying Pennsylvania law). The priority of the judgment will relate back only as to the personal property in which the secured party had a prior perfected security interest; the priority of the judgment will not relate back to other property of the debtor to which the judgment lien attaches. *See* MISS. CODE ANN. § 75-9-501(5) (1981); CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 4.03[2][a], at 4-32; WILLIAM H. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES § 9-501:11, at 9-647 (1997).

[7] *See* Dakota Bank & Trust Co. v. Reed, 402 N.W.2d 887, 892 (N.D. 1987) (stating that judicial sale is not governed by U.C.C.); *see also* MISS. CODE ANN. § 75-9-504 (1981) (listing requirements of notice and reasonableness).

[8] MISS. CODE ANN. § 75-9-501(5) (1981).

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[9] MISS. CODE ANN. § 75-3-118(a) (Supp. 1996). Section 75-3-118 applies to "notes." A note is defined as an "instrument." *Id.* § 75-3-104(e). An "instrument" means a "negotiable instrument." *Id.* § 75-3-104(b).

[10] *See* MISS. CODE ANN. § 75-3-118(a) (Supp. 1997); Davis v. Agents Fin. Corp., 164 So. 2d 449, 453 (Miss. 1964) (applying rule that statute of limitations starts running when installment is due); Freeman v. Truitt, 119 So. 2d 765, 771 (Miss. 1960) (holding that statute of limitations begins to run when each installment is due). A secured party bringing an action on an installment note normally would accelerate the indebtedness if the note provided for acceleration.

[11] MISS. CODE ANN. § 75-3-118(b) (Supp. 1997).

[12] MISS. CODE ANN. § 75-3-108(c) (Supp. 1997).

[13] *See* MISS. CODE ANN. § 15-1-49(1) (1995). For the statute of limitations applicable to bringing an action for a deficiency following foreclosure, *see infra* text accompanying notes 300-4.

[14] *See* United States Fidelity & Guar. Co. v. Krebs, 190 So. 2d 857, 859-60 (Miss. 1966) (stating that demand notes are due on date of execution).

[15] *See* Belhaven College v. Downing, 62 So. 2d 372, 374 (Miss. 1953). *See also* Shapleigh Hardware Co. v. Spiro, 106 So. 209, 210 (Miss. 1925) (discussing how intent of parties determines whether demand is condition to maturity).

B. Set-Off

Funds deposited in a bank account belong to the bank, and the bank is a debtor to the owner of the account for the amount deposited.[16] When the depositor also is a debtor of the bank, the bank has a common-law right to apply, or "set off," the funds in a debtor depositor's account toward payment of the indebtedness to the bank.[17] The bank's right of set-off can be exercised regardless of any agreement with the owner of the account to the bank and without any notice.[18]

The bank can exercise this right of set-off even if the indebtedness of the owner of the account is secured by other collateral.[19] However, if the bank does not exercise this right, the bank has no liability to third parties, such as sureties or guarantors of the owner of the account.[20]

When the bank knows that the owner of the account is holding funds in its account in trust for a third party, the bank cannot set-off these trust funds to pay the owner's individual liability.[21] However, the bank is not liable to the owner if the deposits were not designated as trust funds and the bank did not have reason to know the special nature of these funds.[22]

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[16] *See* Gilbert v. First Nat'l Bank, 633 F.2d 686, 688 n.3 (5th Cir. 1980) (applying Mississippi law); Deposit Guar. Nat'l Bank v. B. N. Simrall & Son, Inc., 524 So. 2d 295, 299 (Miss. 1987) (en banc) (stating that bank is debtor to owner of account); Citizens Nat'l Bank v. First Nat'l Bank, 347 So. 2d 964, 968 (Miss. 1977) (noting that bank and depositor have debtor-creditor relationship).

[17] *See B. N. Simrall & Son, Inc.*, 524 So. 2d at 299-300 (citing Moreland v. People's Bank, 74 So. 828, 829-30 (Miss. 1917)). *See also* Duncan v. Coahoma Bank, 397 So. 2d 891, 893 (Miss. 1981) (holding bank has right of set-off where debt is secured by collateral and debtor defaults).

[18] *See* Pongetti v. National Bank of Commerce (*In re* Wellington Constr. Corp.), 80 B.R. 813, 818 (Bankr. N.D. Miss. 1987) (applying Mississippi law).

[19] *See B. N. Simrall & Son, Inc.*, 524 So. 2d at 300; *Duncan,* 397 So. 2d at 893. The court in *Duncan v. Coahoma Bank* stated:

> We adopt the majority rule and hold that a bank is not deprived of its right of set-off when the indebtedness due it is secured by collateral under a security agreement and the debtor is in default because a creditor may proceed with a number of remedies against a debtor until the debt is satisfied. A bank is not deprived of its right of set-off simply because it had the foresight to require collateral to secure the debt due to it.

Duncan, 397 So. 2d at 893.

[20] *See Moreland,* 74 So. at 831 (holding that bank does not owe surety of debtor duty to set-off); Bank of California v. Starrett, 188 P. 410, 412 (Wash. 1920) (holding that bank does not owe accommodation maker duty to set-off). *But cf.* MISS. CODE ANN. § 87-5-1 (1991) (stating that surety may be discharged if creditor fails to sue principal debtor after notification by surety).

A bank's right of set-off is expressly excluded from Article 9; therefore, a bank does not have to file a financing statement to perfect its right to set-off.[23] Most demand accounts will be deposit accounts which Article 9 also expressly excludes.[24] However, when the proceeds from the sale of a secured party's collateral are deposited in a demand account, the bank's right of set-off may be subject to the secured party's right to the proceeds.[25]

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[21] Central Bank v. Butler, 517 So. 2d 507, 510 (Miss. 1987); *see also* 26 U.S.C. § 408 (1994) (providing that bank cannot set-off against retirement accounts); Lumberton State Bank v. Fortenberry, 222 So. 2d 384, 387-88 (Miss. 1969) (holding trustee could sue bank to restore seized trust funds).

[22] *See B. N. Simrall & Son, Inc.*, 524 So. 2d at 301 (finding no proof of special fund).

[23] MISS. CODE ANN. § 75-9-104(i) (1981 & Supp. 1997). One respected authority on the Uniform Commercial Code has criticized the express exclusion of the right to set-off:

> This exclusion is an apt example of the absurdities which result when draftsmen attempt to appease critics by putting into a statute something that is not in any sense wicked but is hopelessly irrelevant. Of course a right of set-off is not a security interest and has never been confused with one: the statute might as appropriately exclude fan dancing.

GRANT GILMORE, 1 SECURITY INTERESTS IN PERSONAL PROPERTY § 10.7, at 315-16 (1965).

[24] MISS. CODE ANN. § 75-9-104(l) (1981 & Supp. 1997). Revised Article 9 would permit a security interest in a deposit account. Draft § 9-304.

[25] *See generally* CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 1.08[9]; HAWKLAND, *supra* note 6, § 9-104:10, at 218; David B. Harrison, Annotation, *Effect of UCC Article 9 Upon Conflict, As to Funds in Debtor's Bank Account, Between Secured Creditor and Bank Claiming Right of SetOff*, 3 A.L.R.4TH 998 (1981). *But see* MISS. CODE ANN. § 75-9-306(4)(d)(i) (1981 & Supp. 1997) (providing that in insolvency proceedings, secured party's security interest in commingled accounts is subject to bank's right of set-off). A bank's right of set-off will be subject to a federal tax lien. United States v. Sterling Nat'l Bank & Trust Co., 360 F. Supp. 917, 922 (S.D.N.Y. 1973), *modified on other grounds*, 494 F.2d 919 (2d Cir. 1974).

The Mississippi Supreme Court has protected a bank's right of set-off against a competing secured party. In *Bank of Crystal Springs v. First National Bank*, the debtor assigned a certificate of deposit issued by First National Bank to the Bank of Crystal Springs as collateral for a loan.[26] The Bank of Crystal Springs perfected its security interest in the certificate of deposit through possession of the certificate.[27] Upon the debtor's default to both creditors, the Mississippi Supreme Court held that First National Bank's right of set-off against the funds represented by the certificate of deposit had priority over the perfected security interest of the Bank of Crystal Springs in the certificate of deposit itself.[28]

Similarly, the United States Bankruptcy Court for the Northern District of Mississippi has protected a bank's right to set-off against its depositor's certificate of deposit in a priority dispute with a bankruptcy trustee.[29]

C. *Cumulative Remedies*

A secured party's remedies are cumulative and may be exercised in any order.[30] In the pre-U.C.C. case of *Rea v. O'Bannon*, a secured party proceeded to foreclose on a debtor's real estate.[31] The debtor filed an action in chancery court to enjoin the foreclosure, and the secured party filed an action on the note in circuit court.[32] In chancery court, the debtor argued that because of the pending foreclosure, the action on the note should be enjoined.[33] Accepting this argument, the chancery court enjoined the action on the note.[34] However, the Mississippi Supreme Court reversed, and stated:

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[26] Bank of Crystal Springs v. First Nat'l Bank, 427 So. 2d 968, 969 (Miss. 1983). *See generally* Shane F. Langston, *1983 Supreme Court Review*, 54 MISS. L.J. 106 (1984) (discussing *Bank of Crystal Springs* case).

[27] *Bank of Crystal Springs*, 427 So. 2d at 971.

[28] *Id.* The court relied, in part, on section 75-13-1 of the Mississippi Code, which gave First National Bank a right of set-off until notified of the assignment of the certificate of deposit. *Id.*

[29] Pongetti v. National Bank of Commerce (*In re* Wellington Constr. Corp.), 80 B.R. 813, 818 (Bankr. N.D. Miss. 1987) (applying Mississippi law). The court also held that the bank had a perfected security interest in the certificate of deposit by virtue of the language in the promissory note and possession of the certificate of deposit. *Pongetti*, 80 B.R. at 818.

[30] MISS. CODE ANN. § 75-9-501(1) (1981).

[31] 158 So. 916, 916 (Miss. 1935).

[32] *Rea*, 158 So. at 916.

> There is no inconsistency in the two remedies here available to Rea, receiver. He could pursue the foreclosure to conclusion, or, if he deemed it advantageous to himself, he could forego the foreclosure and proceed at law to collect his debt in the law forum. . . . There is no inconsistency between the legal and equitable remedial rights possessed by a mortgagee in case of a breach, and he may exercise them all at the same time, and resort to one is not a waiver of the other.[35]

III. FORECLOSING ON TANGIBLE PERSONAL PROPERTY

A. *Necessity of a Valid Security Interest*

Before employing the remedies available to a secured party under Article 9, the prudent secured party first will confirm that it has an enforceable security interest. A security agreement is enforceable if the secured party has (1) possession of the collateral pursuant to agreement, or (2) a security agreement signed by the debtor that contains a description of the collateral for which value has been given and in which the debtor has rights.[36] Furthermore, the collateral also must be the type of property in which a secured party can take a security interest.[37]

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[33] *Id.* at 918.

[34] *Id.*

[35] *Id.* The Mississippi Supreme Court relied on *Rea* in holding that the plaintiffs could bring an action for wrongful dishonor of checks against a bank at the same time that the plaintiffs were pursuing claims on a bond posted by the owner of the account. Lumberton State Bank v. Fortenberry, 222 So. 2d 384, 388 (Miss. 1969).

[36] MISS. CODE ANN. § 75-9-203(1)(a)-(c) (1981 & Supp. 1997); *see* Ford Motor Credit Co. v. State Bank & Trust Co., 571 So. 2d 937, 939 (Miss. 1990) (requiring security agreement, giving of value, debtor's rights in collateral and signed writing for security interest to attach); *see also* First Bank v. Eastern Livestock Co., 837 F. Supp. 792, 797-98 (S.D. Miss. 1993) (holding that financing statement alone cannot create security interest). A secured party with a perfected first priority security interest can still be barred from enforcing its security interest or lose its priority under the equitable principles that supplement the Code. *See* MISS. CODE ANN. § 75-1-103 (1981) (providing that equitable principles supplement provisions of Mississippi's Article 9); J. L. Teel Co. v. Houston United Sales, 491 So.

To be enforceable, a security interest does not have to be perfected or even be the security interest with first priority.[38] However, in regard to priority, the rights of a secured party whose security interest is not perfected will be subject to the rights of secured parties with perfected security interests[39] and lien creditors.[40] Similarly, the rights of secured parties with a junior priority security interest will be subject to the rights of secured parties with senior security interests.[41]

2d 851, 861 (Miss. 1986) (noting that doctrine of quantum meruit not displaced by U.C.C.); Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1372 (Miss. 1982) (recognizing fraud and misrepresentation exceptions to parol evidence rule); *see also infra* text accompanying notes 101-02 (noting that secured party may be barred from repossessing collateral because of course of dealing). *See generally* Joseph B. Conder, Annotation, *Equitable Estoppel of Secured Party's Right to Assert Prior Perfected Security Interest Against Other Secured Creditor or Subsequent Purchaser Under Article 9 of Uniform Commercial Code*, 9 A.L.R.5TH 708 (1993); Elaine M. Tomko, Annotation, *Liability of Secured Creditor Under Uniform Commercial Code to Third Party on Ground of Unjust Enrichment*, 27 A.L.R.5TH 719 (1995).

[37] *See* MISS. CODE ANN. § 75-9-204(2) (1981) (noting that "no security interest attaches under an after-acquired property clause to consumer goods other than accessions. . . unless the debtor acquires rights in them within ten (10) days after secured party gives value"); FTC Credit Practices Rule, 16 C.F.R. § 444.2 (1996) (stating that it is unfair credit practice for lender to take non-possessory, non-purchase money security interest in household goods). The Uniform Commercial Code generally does not apply to transactions arising in Indian country to which Indian tribes or tribe members are parties. *See generally* John S. Clifford, *Application of Article 9 to Secured Transactions in Indian Country*, 28 U.C.C.L.J. 297 (1996).

[38] *See* MISS. CODE ANN. § 75-9-201 (1981) (stating that security agreement is effective between parties and against creditors); *see also infra* text accompanying notes 255-71 (relating to enforcement of unperfected security interests).

[39] MISS. CODE ANN. § 75-9-301(1)(a) (1981 & Supp. 1997); *see infra* text accompanying notes 252-72 (concerning priorities in proceeds of sale).

[40] MISS. CODE ANN. § 75-9-301(1)(b) (1981 & Supp. 1997); *see infra* text accompanying notes 251-72 (concerning priorities in proceeds of sale).

[41] MISS. CODE ANN. § 75-9-312(5)(a) (1981 & Supp. 1997); *infra* text accompanying notes 251-72 (concerning priorities in proceeds of sale).

B. *Acceleration of Installment Indebtedness*

The Uniform Commercial Code recognizes and implicitly approves the secured party's need to accelerate an installment loan when the debtor defaults.[42] Although the Mississippi Supreme Court has addressed the acceleration of indebtedness in the context of personal property in only a few cases, the abundance of cases which discuss the secured party's right to accelerate with regard to real property should be equally applicable when personal property is at issue.[43]

1. *Right to Accelerate*

The secured party has no inherent right to accelerate an installment loan upon the occurrence of default; this right only exists if the security agreement or other loan documents between the secured party and the debtor creates this right.[44] Once agreed to, an acceleration clause in a contract is valid and enforceable.[45] However, the right to accelerate must be clear and unequivocal.[46] The secured party generally has no duty not to accelerate[47] and is not required to give notice of acceleration unless the loan documents specifically impose such a requirement.[48] However, because of a special relationship or course of dealing with the debtor, the secured party may be required to give notice to the debtor prior to accelerating the indebtedness. For example, In *Johnson v. Gore*, the secured party managed the debtor's financial affairs while the debtor was in prison.[49] Because of the extent of the debtor's reliance on the secured party in this circumstance, the court held that the secured party had an obligation to give the debtor an accounting before accelerating the indebtedness.[50] The court noted that "it is generally accepted that a court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause in a mortgage where the default of the mortgagor was the result of some unconscionable or inequitable conduct of the mortgagee."[51]

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[42] MISS. CODE ANN. §§ 75-1-208, 75-3-108(b)(ii) (1981 & Supp. 1997).

[43] The Mississippi Supreme Court has applied doctrines from the Uniform Commercial Code to cases involving real property. *See, e.g.*, Shutze v. Credithrift of America, Inc., 607 So. 2d 55, 64-65 (Miss. 1992) (stating that court may apply Code rules to future advances secured by deeds of trust); Wansley v. First Nat'l Bank, 566 So. 2d 1218, 1224-25 (Miss. 1990) (holding that obligation of commercial reasonableness applies to real property foreclosure); *see also* United States v. Sims, 586 F.2d 580, 588 (5th Cir. 1978) (anticipating that Mississippi courts would apply impairment of collateral rules to real property cases); Ford Motor Co. v. Mathis, 660 So. 2d 1273, 1277 (Miss. 1995) (McRae, J., dissenting) (making analogy between deficiency judgments in real and personal property cases). However, one must be cautious in extending doctrines under the Uniform Commercial Code to fill gaps in real property law. The nature of real property gives rise to considerations that have no parallel in personal property law, such as the title recording system and adverse possession. For example, the obligation of commercial reasonableness that the *Wansley* decision imposes on mortgagees in real property foreclosures arguably is inappropriate because the method, manner, time, place and terms of real property foreclosures are fixed by statute and case law, unlike foreclosures of personal property under the Uniform Commercial Code.

[44] *See* Boatright v. Horton, 86 So. 2d 864, 868 (Miss. 1956) (noting that acceleration clauses are matter of contract).

[45] Caldwell v. Kimbrough, 45 So. 7, 9 (Miss. 1907).

[46] The Mississippi Supreme Court has stated:

The failure of the secured party to accelerate the indebtedness upon the debtor defaults does not operate as a waiver of the secured party's right to accelerate later. However, delay can give rise to an estoppel if the debtor changes his position in reliance on the delay.[52]

> It is a recognized principle that a contract to accelerate the maturity of a debt gives a harsh remedy, and that in order to be effective, it should be clear and unequivocal, and that if there is a reasonable doubt as to the meaning of the language employed, preference should be given to that construction which will prevent the acceleration of maturity.

Boatright, 86 So. 2d at 868.

[47] *See* Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352, 1360 (Miss. 1995) (finding plaintiff failed to show bank owed duty not to accelerate).

[48] Day v. Hogans, 93 So. 578, 579 (Miss. 1922); *see also* Dunton v. Sharpe, 12 So. 800, 800 (Miss. 1893) (stating that creditor's failure to "formally declare" total debt was due did not invalidate acceleration). The court in *Caldwell v. Kimbrough* stated that the due and unpaid notes were sufficient notice that the secured parties had the right to accelerate, making it unnecessary to give the debtor "any further notice than that contained in the instrument itself." *Caldwell*, 45 So. at 10. Some deed of trust forms used by the Federal National Mortgage Association in Mississippi require a 30-day notice to the debtor before acceleration.

[49] 80 So. 2d 731, 736 (Miss. 1955).

[50] *Johnson*, 80 So. 2d at 736.

[51] *Id.*

[52] In one case addressing this issue, the Mississippi Supreme Court stated:

In a case involving personal property, the Mississippi Supreme Court held that a bank's delay of two months in accelerating an indebtedness after default did not support an award of punitive damages.[53] In that case the default was attributable to the debtor incurring additional indebtedness without the bank's consent.[54] The bank waited to see how the additional debt would affect the debtor's cash flow.[55] When the new debt worsened the debtor's cash flow and threatened the repayment of the bank's indebtedness, the bank accelerated the indebtedness.[56]

Generally, an acceleration clause is contained in both the promissory note and the security agreement. What if the security agreement contains an acceleration clause, but the note does not? In a case in which a deed of trust on real property had an acceleration clause, but the note secured by the deed of trust did not, the Mississippi Supreme Court held that the secured party could accelerate the indebtedness for purposes of foreclosure, but not for the purpose of an action on the note.[57]

2. *Acceleration Under Insecurity Clause*

A secured party has an obligation under the Uniform Commercial Code to act in good faith.[58] This good faith obligation

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> It [was] not necessary for this option to be exercised at once in order to make it valid. It [was] only necessary that the mortgagees exercise this option with such reasonable expedition as that the mortgagors might not be lulled into the belief that the rights under this deed in trust were to be waived.

Caldwell, 45 So. at 10.

[53] Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352, 1363 (Miss. 1995). The supreme court also held that the bank did not violate the duty of good faith required under section 75-1-208 to accelerate because the duty does not apply when the debtor defaults. *Cermack*, 658 So. 2d at 1357-58; *see infra* text accompanying note 58-76 (discussing secured party's obligation of good faith when secured party accelerates because of insecurity).

[54] *Cermack*, 658 So. 2d at 1355.

[55] *Id.* at 1362.

[56] *Id.* at 1362-63.

[57] *Boatright*, 86 So. 2d at 868.

[58] *See* MISS. CODE ANN. § 75-1-203 (1981); *see also id.* § 75-1-201(19) (Supp. 1997) (defining "good faith"). Although the official version of section 1-201(19) of

does not apply when a secured party accelerates the indebtedness because of a default within the control of the debtor, such as a failure to make payments or failure to purchase insurance protecting the collateral.[59] But most security agreements permit the secured party to declare a default and accelerate the indebtedness when the secured party deems itself insecure or its prospect of payment impaired.[60] If the secured party seeks to accelerate the indebtedness based on a provision of this type, commonly called an insecurity clause, another statute becomes relevant. Section 75-1-208 of the Mississippi Code provides:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.[61]

"Good faith" is defined as "honesty in fact in the conduct or transaction concerned."[62] These statutes, read together, were intended to mean that the test for good faith acceleration of indebtedness pursuant to an insecurity clause should be whether the secured party in fact believed they were insecure, regardless of whether such belief was reasonable. The debtor

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the Uniform Commercial Code and section 75-1-201(19) both define "good faith" as "honesty in fact in the conduct or transaction concerned," Revised Article 9 will contain a more objective definition of "good faith" for purposes of Article 9: "honesty in fact and the observance of reasonable commercial standards of fair dealing." Draft § 9-102(28).

[59] *See Cermack*, 658 So. 2d at 1357-58.

[60] *See* CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 4.02[2][a], at 4-8. The Mississippi Bankers Association UCC Form No. 2 (November 1985), a form of security arrangement which is commonly used in Mississippi, provides that the secured party can accelerate the indebtedness if it "deems itself insecure."

[61] MISS. CODE ANN. § 75-1-208 (1981). This statute conforms to section 1-208 of the official text of the Uniform Commercial Code. *See* U.C.C. § 1-208, 1 U.L.A. 152 (1989). The official comment to section 1-208 of the Uniform Commercial Code states that this provision does not apply to demand notes. *Id.*

[62] MISS. CODE ANN. § 75-1-201(19) (Supp. 1997).

who objects to the acceleration has the burden of proving that the secured party did not believe itself to be insecure.[63] This test is sometimes called the subjective or the "pure head and empty heart" rule and has been recognized by a number of courts.[64] Other courts have determined that these statutes place too heavy a burden on the debtor and have held that the secured party can accelerate under an insecurity clause only if a reasonable person would have believed himself insecure under the same circumstances, regardless of what the secured party itself actually believed.[65] This is sometimes called the objective standard. The Mississippi Supreme Court, in *Black v. Peoples Bank & Trust Co.*, determined that the objective standard was consistent with pre-Code Mississippi cases and applied it as the better rule.[66] The court in *Black* stated that the secured party who wishes to rely on an insecurity provision to accelerate the indebtedness "may proceed upon such circumstances of presently apparent danger as would furnish probable cause for the belief that his security is unsafe when viewed in good faith by a man of reasonable prudence."[67] Whether the secured party was reasonable in its belief that it was insecure is a question of fact to be determined by the trier of fact.[68] A secured party should be cautious in relying on an insecurity clause as the sole basis for accelerating indebtedness, because what may seem reasonable to the secured party at the time of acceleration may not seem so reasonable to a jury with the benefit of hindsight.

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[63] *See* CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 402[2][a], at 4-7.

[64] *See* Jay M. Zitter, Annotation, *What Constitutes "Good Faith" Under UCC §1-208 Dealing With "Insecure" or "At Will" Acceleration Clauses*, 85 A.L.R.4TH 284, 296-97 (1991).

[65] *See id.* at 294-96.

[66] 437 So. 2d 26, 29-30 (Miss. 1983). *See generally* Shane F. Langston, *1983 Mississippi Supreme Court Review*, 54 MISS. L.J. 110 (1984) (discussing subjective versus objective standards). This holding is consistent with pre-Code law. *See* Commercial Credit Co. v. Spence, 184 So. 439 (Miss. 1938).

[67] *Black*, 437 So. 2d at 29 (*quoting* Commercial Credit Co. v. Cain, 1 So. 2d 776, 777 (Miss. 1941)). The quoted statement also appears in Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352, 1357 (Miss. 1995).

[68] *Black*, 437 So. 2d at 30; *accord Cermack*, 658 So. 2d at 1357.

In *Black v. Peoples Bank & Trust Co.*, the secured party deemed itself insecure and accelerated indebtedness when it discovered, first that the debtor, who had a good credit rating, had purchased the collateral for the benefit of the debtor's son, who had a bad credit rating and to whom the secured party would not have made the loan, and, second, that the debtor was relying on his son to make the loan payments.[69] In that case the jury returned a verdict for the debtor and awarded the debtor damages.[70] Similarly, courts in other states have found that secured parties acted reasonably in accelerating because of insecurity when the debtor's financial status changed after the loan,[71] when the debtor threatened to file bankruptcy,[72] when the debtor repeatedly made late payments,[73] when the secured party discovered that the debtor did not disclose other outstanding loans at the time that the debtor applied for the secured party's loan,[74] and when the debtor sold[75] or abandoned[76] the collateral.

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[69] *Black*, 437 So. 2d at 28.

[70] *Id.* at 27. The trial court awarded the secured party a judgment notwithstanding the verdict. *Id.* The Mississippi Supreme Court reversed and reinstated the jury's verdict for the debtor. *Id.* at 30.

[71] *See* Jackson v. State Bank of Wapello, 488 N.W.2d 151, 157 (Iowa 1992). *See generally* Zitter, *supra* note 64, at 297-306 (discussing good faith determination of insecurity).

[72] *See* Peoples State Bank & Trust Co. v. Krug (*In re* Krug), 189 B.R. 948, 958 (Bankr. D. Kan 1995) (applying Kansas law); Jack M. Finley, Inc. v. Longview Bank & Trust Co., 705 S.W.2d 206, 208, 209 (Tex. Ct. App. 1985). *See generally* Zitter, *supra* note 64, § 6 at 306-08. (discussing debtor's threat of non-payment, late payment or bankruptcy). In *Finley*, the court held that the bank could accelerate the note under an insecurity clause even though the note was secured by a certificate of deposit with the bank in the same amount as the note. *Jack M. Finley, Inc.*, 705 S.W. 2d at 211.

[73] *See* Salsbery v. Ford Motor Credit Co., 635 P.2d 669, 672 (Or. Ct. App. 1981). In this case, every payment was late despite numerous warnings from the secured party. *Salsbery*, 635 P.2d at 672.

[74] *See* Sparkman v. Peoples Nat'l Bank, 580 S.W.2d 868, 869 (Tex. Civ. Ct. App. 1979). *See generally* Zitter, *supra* note 64, § 10, at 317-19 (discussing matters pre-dating loan).

[75] *See* Sturman v. First Nat'l Bank, 729 P.2d 667, 677 (Wyo. 1986). In *Sturman*, the debtor claimed that the secured party had waived the express restriction in the security agreement concerning selling the collateral through the parties' course of dealing. *Sturman*, 729 P.2d at 673-74. The court stated that the secured party was entitled to accelerate under the insecurity clause regardless of the parties' course of dealing. *Id.* at 677. *See generally* Zitter, *supra* note 64,

3. Reinstatement After Acceleration

Under common law, a debtor did not have the right to reinstate an installment indebtedness after acceleration.[77] A debtor has a statutory right pursuant to section 75-9-506 of the Mississippi Code to reinstate the accelerated indebtedness and redeem collateral at any time prior to the time that the secured party disposes of collateral simply by paying the secured party all of the past due installments plus the secured party's attorneys fees and other costs in repossessing the collateral and preparing it for sale.[78] Even if the secured party elects to bring an action on the note only and does not proceed against the collateral, the debtor has this right to reinstate the indebtedness.[79]

In *Universal C.I.T. Credit Corp. v. Turner*, the secured party continued to repossess its collateral despite the tender of the amount necessary to redeem by an accommodation maker.[80] The Mississippi Supreme Court held that this tender terminated the secured party's right to repossess the collateral and that the secured party became liable for conversion when it

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§ 13, at 320-21 (discussing debtor's actions impairing security of collateral).

[76] Anderson v. Mobile Discount Corp., 595 P.2d 203, 204 (Ariz. Ct. App. 1979). In this case, the court held that acceleration was reasonable even though the debtor was current in its payments. *Anderson*, 595 P.2d at 204.

[77] *See* Smith v. Williams-Brooke Co., 71 So. 648, 649-50 (Miss. 1916); Caldwell v. Kimbrough, 45 So. 7, 10 (Miss. 1907).

[78] MISS. CODE ANN. § 75-9-506 (1981). This statute varies from the official text of section 9-506 of the Uniform Commercial Code, which requires the debtor to tender the entire accelerated indebtedness, not just the past due installments. *See* Black v. Peoples Bank & Trust Co., 437 So. 2d 26, 30 (Miss. 1983); U.C.C. § 9-506, 3B U.L.A. 370 (1992). If someone other than the debtor owns the collateral, the owner has the same right as the debtor to redeem the collateral prior to sale. *See* MISS. CODE ANN. § 75-9-112(c) (1981). Another Mississippi statute gives a debtor the right to reinstate before a sale of real property under a deed of trust. *Id.* § 89-1-59 (1991).

[79] *See* Rankin Properties, Ltd. v. Woodhollow Estates, 714 F. Supp 800, 804 (S.D. Miss. 1989) (applying Mississippi law). This holding is based on "the longstanding policy of Mississippi to protect the collateral." *Rankin Properties*, 714 F. Supp. at 804.

[80] 56 So. 2d 800, 801 (Miss. 1952).

rejected the tender and proceeded to repossess the collateral.[81]

The secured party has no affirmative obligation under Mississippi law to inform the debtor of this right to reinstate. However, as noted above, the secured party's relationship or course of dealing with the debtor may require the secured party to provide the debtor with an accounting prior to accelerating the indebtedness.[82] The secured party also cannot defeat the debtor's right to reinstate by refusing to provide an accounting of the indebtedness.[83] In a case involving foreclosure of real property, the Mississippi Supreme Court affirmed an award of actual and punitive damages against a secured party who would not inform the debtor of the amount necessary to reinstate after the debtor offered to reinstate.[84]

The Mississippi Supreme Court has rejected arguments by a secured party that the debtor's right to reinstate the indebtedness and redeem the collateral does not apply when the secured party accelerates under an insecurity clause, but only when the default is due to the debtor's nonperformance of a duty.[85]

In *Rogers v. Commercial Credit Corp.*, the testimony conflicted about whether the debtor made a proper tender of the amount necessary to redeem the collateral.[86] The Mississippi Supreme Court held that the conflicting evidence made a jury question of whether the debtor had made proper tender.[87] The court also stated that the debtor does not have to make a formal tender of the amount necessary to reinstate when it appears that the secured party would not have accepted the tender had it been made.[88]

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[81] *Universal C.I.T. Credit Corp.*, 56 So. 2d at 801.

[82] *See supra* text accompanying notes 47-51.

[83] Revised Article 9 provides a suggested form of notice of sale to consumers that informs the consumer of the right and amount necessary to reinstate. Draft § 9-613(b)(2). Revised Article 9 also provides that a debtor may request an accounting of the indebtedness and that the secured party must comply with this request. Draft § 9-209. If the secured party fails to comply with this request, the debtor is entitled to minimum damages of $500. Draft § 9-624(f).

[84] National Mortgage Co. v. Williams, 357 So. 2d 934, 937-38 (Miss. 1978); *see also* Tonkel v. Shields, 87 So. 646, 648 (Miss. 1921) (finding it proper for court to enjoin foreclosure when dispute existed over amount due and secured party would not give accounting).

[85] *Black,* 437 So. 2d at 30. As discussed above, the secured party's obligation of good faith does not come into play when the secured party accelerates because of a debtor's breach of an express covenant. *See supra* text accompanying note 59.

[86] 354 So. 2d 259, 260-61 (Miss. 1978).

4. Repossession and Foreclosure Without Acceleration

In regards to foreclosure of a deed of trust, the general rule in Mississippi is: "in the absence of a prohibition, the mortgagee may proceed to foreclose for a past-due note or installment."[89] This rule applies to loans secured by personal property.[90] Since a secured party's right to repossess collateral is separate and independent of the secured party's right to accelerate the indebtedness,[91] a secured party does not have to accelerate the indebtedness as a condition to repossessing or selling the collateral.[92] A secured party can repossess the collateral and then accelerate the indebtedness prior to selling the collateral.[93]

If the secured party does not accelerate the indebtedness prior to a sale under section 75-9-504 of the Mississippi Code, the secured party will be able to recover from the sale only the amount of the past due installment and will have to account to the debtor for any surplus.[94] If a debtor misses one installment, the secured party can repossess and sell one item of collateral to recover the amount of that installment. If the debtor misses the next installment, the secured party could repeat the process. This procedure may continue until the indebtedness or the collateral is depleted and without the secured party ever accelerating the indebtedness.

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[87] *Rogers*, 354 So. 2d at 263.

[88] *Id.* at 262-63.

[89] Federal Land Bank v. Robinson, 134 So. 180, 184 (Miss. 1931).

[90] *See infra* text accompanying notes 91-93.

[91] *See* Klingbiel v. Commercial Credit Corp., 439 F.2d 1303, 1307 (10th Cir. 1971) (applying Kansas law).

[92] *See* Rogers v. Associates Commercial Corp., 632 P.2d 1002, 1003 (Ariz. Ct. App. 1981); Ford Motor Credit Co. v. Hunt, 245 S.E.2d 295, 296 (Ga. 1978).

[93] *See Rogers,* 632 P.2d at 1006.

[94] *See* MISS. CODE ANN. § 75-9-504 (1981) (stating secured party's obligation to account to debtor for surplus).

C. *Obtaining Possession of the Collateral*

Depending on the nature of the collateral, the secured party may not necessarily have to possess the collateral in order to sell the collateral. But generally, the secured party will need to obtain possession of the collateral in order to protect its value and to have the ability to sell the collateral. In Mississippi, the secured party can obtain possession of the collateral by self-help repossession or by replevin.[95] However, once the secured party takes possession of the collateral, it must dispose of it within a reasonable time pursuant to section 75-9-504 or section 75-9-505 of the Mississippi Code.

1. *Bankruptcy Limits on Repossession*

The secured party's rights to obtain possession of the collateral may be limited by bankruptcy law. For example, if the debtor is in bankruptcy, the secured party must obtain the consent of the bankruptcy court before taking possession of collateral.[96] Moreover, if the secured party repossesses the collateral and the debtor files bankruptcy before the secured party disposes of the collateral, the secured party may have to turn the collateral over to the bankruptcy trustee.[97]

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[95] Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108, 1109 (Miss. 1992).

[96] *See* 11 U.S.C. § 362(a) (1994); CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 6.08, at 6-101.

[97] 11 U.S.C. § 542 (1994); *see* Willis v. Parks Chevrolet, Inc. (*In re* Willis), 34 B.R. 451, 454 (Bankr. M.D.N.C. 1983). All legal and equitable interests of the debtor at the time of the filing of the bankruptcy petition are property of the estate, regardless of whether the debtor has possession of the property. 11 U.S.C. § 541(a)(1) (1994). The court in *In re Willis* stated:

> At the time of the filing, the Debtor retained legal title to the car and the equitable rights to cure the default, redeem the vehicle, receive an accounting and receive any surplus. Since foreclosure under the security interest had not been completed at the time of the Chapter 13 petition filing, the Debtor held both legal and equitable interests in the car and it was property of the estate at the moment the petition was filed. The

2. *Self-Help Repossession*

Section 75-9-503 of the Mississippi Code provides, in relevant part, as follows:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . [98]

The Mississippi Supreme Court has addressed this remedy in a number of cases. Although many of these cases are pre-Code automobile repossession cases,[99] the Mississippi Supreme Court has stated section 75-9-503 was a codification of then existing law regarding self-help repossession.[100]

a. *Notice Prior to Repossession*

Section 75-9-503 of the Mississippi Code provides that a secured party has the right to take possession of collateral after default "unless otherwise agreed." This statute recognizes that the parties could agree in the security agreement that the secured party will give notice to the debtor prior to repossessing the collateral. A prudent secured party will review the security agreement for any such limitation prior to repossessing the

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> car, therefore, would be subject to the automatic stay provision.

Willis, 34 B.R. at 454. The court awarded the debtor punitive damages and attorneys fees, in addition to actual damages. *Id.* at 455.

[98] MISS. CODE ANN. § 75-9-503 (1981). Section 75-9-503 conforms to the official text of section 9-503 of the Uniform Commercial Code. *See* U.C.C. § 9-503; 3B U.L.A. 53 (1992).

[99] Under section 75-1-103, the common law in existence at the time Mississippi adopted the Uniform Commercial Code remains applicable unless it is displaced by the Code. MISS. CODE ANN. § 75-1-103 (1981); *see* H & W Indus., Inc. v. Formosa Plastics Corp., 860 F.2d 172, 180 (5th Cir. 1988) (applying pre-Code Mississippi statute of frauds).

[100] Hester v. Bandy, 627 So. 2d 833, 841 (Miss. 1993). Actually, the Code makes one change. Prior to the adoption of section 75-9-503, the secured party only had the remedy of self-help repossession when the contract between the secured party and the debtor expressly provided it; section 75-9-503 gives the secured party this remedy unless the contract expressly forbids it. *See* James v. Pinnix, 495 F.2d 206, 209 & n.10 (5th Cir. 1974).

collateral. However, such a limitation would be unusual since one reasonably can anticipate that if the secured party gave the debtor notice that the secured party intended to take possession of the collateral, the debtor might move or hide the collateral. Nevertheless, if the security agreement requires notice to the debtor prior to repossession and the secured party repossesses without giving the required notice, the secured party may be liable for conversion.[101]

After default, the secured party and debtor verbally could agree that the debtor will retain possession of the collateral. In this case the debtor would have the right to sue the secured party for conversion if the secured party repossessed the collateral despite the agreement.[102] Also, if the secured party tolerated prior defaults without taking any action, the secured party may be estopped from repossessing the property and be required to give the debtor notice before exercising this remedy.[103]

b. Due Process

Except in the circumstances described in the preceding section, the secured party is not required by law to give any notice to the debtor or to initiate any judicial proceedings before repossessing the collateral.[104] Furthermore, both the Mississippi Supreme Court and the Fifth Circuit Court of Appeals have held that self-help repossession does not involve state action and, therefore, does not violate the Fourteenth Amendment to the United States Constitution.[105] These decisions are consistent with decisions from other states.[106]

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[101] *See* Klingbiel v. Commercial Credit Corp., 439 F.2d 1303, 1307-08 (10th Cir. 1971) (applying Kansas law).

[102] Zimprich v. North Dakota Harvestore Sys., Inc., 461 N.W.2d 425, 428-29 (N.D. 1990).

[103] *See* Moe v. John Deere Co., 516 N.W.2d 332, 338 (S.D. 1994). Courts differ on whether anti-waiver language in the contract will prevent the estoppel. *Compare* Johnson v. Central Bank, 514 So. 2d 969, 969-70 (Ala. 1987) (holding nonwaiver language prevents estoppel) with *Moe,* 516 N.W.2d at 337 (finding nonwaiver clause not effective to prevent estoppel). In *Moe,* the court stated:

> We hold that the repeated acceptance of late payments by a creditor who has the contractual right to repossess the property imposes a duty on the creditor to notify the debtor that strict compliance with the contract terms will be required before the creditor can lawfully repossess the collateral.

Id. at 338. In this case, the court found that substantial evidence existed from which the jury could infer that the lender knew or should have known that the debtor needed to retain the collateral to perform certain tests. *Id.* The Mississippi Supreme Court has not addressed this issue.

c. *Secured Party's Duty Not to Breach the Peace*

The drafters of the Uniform Commercial Code did not define what constitutes a breach of the peace, but left this term to be defined by the courts. The Mississippi Supreme Court has stated that "much of the litigation involving self-help repossession statutes involves the issue of whether a breach of peace has occurred. Disposition of this issue is not a simple task. . . ."[107] However, the Mississippi Supreme Court has decided enough cases involving self-help that some general guidelines have been formulated.

First, it is well settled that no breach of the peace occurs when a secured party enters upon a debtor's driveway at night and repossesses an automobile without the debtor's knowledge and without any force or violence.[108] No breach of the peace occurs if a secured party repossesses an automobile parked at the debtor's employer's parking lot[109] or at a mechanic's lot awaiting repairs.[110] But a breach of the peace may occur if the secured party makes a forcible entry to obtain possession. For example, no breach of the peace occurred when a secured party used a pocket knife to remove screws holding a screen over a ventilator and then reached inside the vehicle to unlock the door.[111] When a secured party broke a window to gain entry into an automobile, however the court held that a breach of peace occurred and stated:

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[104] *See generally* Jay M. Zitter, Annotation, *Secured Transactions: Right of Secured Party to Take Possession of Collateral on Default Under UCC Section 9-503*, 25 A.L.R.5TH 696, 727-29 (1994) (discussing general principles of repossession).

[105] Bowman v. Chrysler Credit Corp., 496 F.2d 1322, 1322 (5th Cir. 1974); *James*, 495 F.2d at 209; McComb Equip. Co. v. Cooper, 370 So. 2d 1367, 1368 (Miss. 1979).

[106] *See* Gary D. Spivey, Annotation, *Validity, Under Federal Constitution and Laws, of Self-Help Repossession Provision of § 9-503 of Uniform Commercial Code*, 29 A.L.R. FED. 418 (1976); Gary D. Spivey, Annotation, *Validity, Under State Law, of Self-Help Repossession of Goods Pursuant to UCC § 9-503,* 75 A.L.R.3D 1061 (1977) (discussing validity of self-help repossession under state law).

[107] Ivy v. General Motors Acceptance Corp., 612 So. 2d 1108, 1112 (Miss. 1992).

[108] *See* Butler v. Ford Motor Credit Co., 829 F.2d 568, 570 (5th Cir. 1987) (applying Mississippi law); Hester v. Bandy, 627 So. 2d 833, 840 (Miss. 1993); Dearman v. Williams, 109 So. 2d 316, 320 (Miss. 1959).

[109] *See* Martin v. Cook, 114 So. 2d 669, 673 (Miss. 1959); Furches Motor Co. v.

> [T]he authorities are in substantial agreement that the right to take the property from the possession of the other party does not justify the use of force to take it, — it must be done without force or violence, and if possession cannot be so obtained, then resort must be had to the processes of the courts.[112]

Second, no breach of the peace occurs if the debtor or a third party in possession of the collateral is present and withholds consent or simply protests against the secured party taking possession, but neither the secured party nor the debtor uses threats or force.[113] In *Commercial Credit Co. v. Cain,*[114]

Anderson, 61 So. 2d 674, 679 (Miss. 1952).

[110] Bradley v. Associates Discount Corp., 92 So. 2d 468, 472 (Miss. 1957).

[111] *Martin,* 114 So. 2d at 671.

[112] Commercial Credit Co. v. Spence, 184 So. 439, 441 (Miss. 1938); *accord* Martin v. Van Dorn Equip. Co., 821 P.2d 1025, 1028 (Mont. 1991). In *Martin v. Van Dorn Equipment*, the secured party gained entry to the debtors' property to repossess its collateral by cutting a chain on a gate with bolt cutters. *Martin*, 821 P.2d at 1028. The Supreme Court of Montana determined that any such forcible entry constituted a breach of the peace. *Id.*

[113] *See, e.g.,* Austin v. General Motors Acceptance Corp., 125 So. 2d 79, 82 (Miss. 1960); Furches Motor Co. v. Anderson, 61 So. 2d 674, 680 (Miss. 1952); Commercial Credit Co. v. Cain, 1 So. 2d 776, 777-78 (Miss. 1941). Although all three of these cases involve protests or lack of consent by third persons in possession of the collateral, and not the debtor himself, the court's language in these cases indicate that the holdings would be equally applicable to a case in which the debtor protests or withholds consent. In *Ivy*, the court stated, "This Court has also held that a creditor, who repossesses collateral despite the fact that the debtor has withheld his or her consent or has strongly objected, did not breach the peace." In support of this statement, the court cited *Commercial Credit Co. v. Cain* and *Furches Motor Co. v. Anderson. Ivy*, 612 So. 2d at 1111.

[114] 1 So. 2d 776 (Miss. 1941).

the debtor's husband possessed the subject automobile at the time the secured party sought to repossess it, and he objected to the repossession, but "there was no altercation, nor was there any force, or violence or threats thereof."[115] The husband left the keys and exited the car, and the secured party drove off in it. At trial the debtor alleged a wrongful repossession, and the jury awarded her actual and punitive damages. On appeal the Mississippi Supreme Court reversed and stated:

> [T]he mortgagee has the right to take possession, in so far as concerns the manner thereof, over the objections of the mortgagor, so long as openly done at a proper place, and without force or violence or any threat thereof, and when the circumstances are such as to create no apprehension of any violence on the part of the mortgagor, or other person from whom the possession is being taken.[116]

The court also noted that if, by withholding consent, a debtor could nullify a secured party's right to take possession, then the secured party's right to take possession would be meaningless.[117]

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[115] *Cain*, 1 So. 2d at 777.

[116] *Id.* at 778. In *Furches Motor Co. v. Anderson*, the debtor's agent was in possession of the collateral and did not consent to the repossession, but did not protest the repossession either. *Furches Motor Co.*, 61 So. 2d at 677. The court held that consent was not necessary. *Id.* at 680. Other state courts also have found no breach of peace when the debtor objected, but no violence or injury occurred. *See* Williams v. Ford Motor Credit Co., 674 F.2d 717, 720 (8th Cir. 1982) (applying Arkansas law); Rainwater v. Rx Med. Serv. Corp., 30 U.C.C. Rep. Serv. 2d 983, 991 (E.D. Cal. 1995) (applying California law); Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1174 (Ill. App. Ct. 1996) (holding simple protest by debtor does not constitute breach of peace under Illinois law).

[117] *Cain*, 1 So. 2d at 777-78. *But cf.* Kirkwood v. Hickman, 78 So. 2d 351, 356 (Miss. 1955) (holding secured party cannot enter debtor's residence without debtor's consent). Courts in other states have reached different conclusions about the effect of the borrower after default and before repossession telling the secured party not to enter the debtor's property to repossess the collateral. In Bloomquist v. First Nat'l Bank, 378 N.W.2d 81, 84 (Minn. Ct. App. 1985), the court held that a secured party had an implied right to enter the debtor's property, but that the debtor could revoke this consent, in which case the secured party would have to pursue a judicial remedy. In Wade v. Ford Motor Credit Co., 668 P.2d 183, 184 (Kan. Ct. App. 1983), the debtor told the secured party's collection agent that she had a gun and that "[she] would leave him laying right where [she] saw him" if

Third, a breach of the peace occurs if a secured party persists with repossession when the debtor strongly protests and physically attempts to resist the repossession. For example, in *Hester v. Bandy*, the debtor awoke at 3:00 a.m. to find two men outside of his home hooking his van up to a tow truck.[118] The debtor yelled at the men and chased the truck, but in his pursuit, the debtor fell and injured himself.[119] The Mississippi Supreme Court held that the secured party had breached the peace.[120] The court seemed particularly sensitive to the time at which the attempted repossession took place.

> Evans' decision to repossess the van in the early morning hours from the Hester residence was deliberate. His purpose, of course, was to make a "quick snatch" of the van and get away, all without the knowledge of the Hesters. This was a tactic which guaranteed generating fright or anger, or both, if discovered in progress by the Hesters. It was fraught with the peril of provoking a breach of peace of the most serious kind.
>
> When Evans was in fact discovered and Hester attempted to physically resist the repossession, this terminated Evans' right to continue, because in doing so he caused a breach of the peace. Evans did not cease, but carried his repossession on out, and this was without legal authority. He

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he came after her car again. *Wade*, 668 P.2d at 184. The collection agent nevertheless persisted and was successful in taking possession of the car in the middle of the night without the debtor's knowledge. *Id.* at 184-85. The court held that no breach of the peace occurred. *Id.* at 189.

Since the Mississippi Supreme Court stated in *Commercial Credit Co. v. Cain* that the debtor's consent is not necessary, presumably a court applying Mississippi law would hold that the act of the debtor telling the secured party prior to any attempt to repossess that the secured party did not have the debtor's consent to repossess would be of no effect. However, once the secured party has entered onto the debtor's premises, and the debtor protests, the secured party must leave the debtor's premises. *See* Hester v. Bandy, 627 So. 2d 833, 841 (Miss. 1993) (holding debtor's protest terminated secured party's right to continue to repossess collateral); Austin v. General Motors Acceptance Corp., 125 So. 2d 79, 82 (Miss. 1960) (concluding secured party only had revocable license to enter debtor's premises to repossess collateral).

[118] 627 So. 2d 833, 835 (Miss. 1993).

[119] *Hester*, 627 So. 2d at 835.

[120] *Id.* at 841.

committed a tort in continuing over Hester's protest.[121]

Similarly, in *Ivy v. General Motors Acceptance Corp.*,[122] the secured party towed the debtor's van away early in the morning.[123] The debtor pursued the tow truck in his pickup, and a collision occurred, either because, according to the secured party, the debtor swerved in front of the tow truck and then slammed his brakes, or because, according to the debtor, the tow truck rammed the debtor's pickup.[124] The evidence further conflicted about the extent of the debtor's injuries and whether the debtor wanted to call the sheriff.[125] The Mississippi Supreme Court held that sufficient evidence existed to show that a breach of the peace had occurred.[126]

Fourth, although a secured party can enter onto a debtor's land and take possession of property that is outside of a debtor's residence, a different rule applies to repossession of property within a debtor's residence. In *Kirkwood v. Hickman*, the secured party entered the debtor's residence and repossessed a stove, without the consent or knowledge of the debtor and over the objections of the debtor's daughter-in-law, who was in the house at the time.[127] In the debtor's action for wrongful trespass and repossession, the jury awarded the debtor actual and punitive damages.[128] The Mississippi Supreme Court affirmed and stated:

> Where the repossession occurs in a private residence of the

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[121] *Id.*

[122] 612 So. 2d 1108 (Miss. 1992).

[123] *Ivy*, 612 So. 2d at 1109-10.

[124] *Id.* at 1110 & nn.4-5. Interestingly, the collision occurred on a public road after the secured party's agents had secured the collateral and left the debtor's property. *Id.* at 1110. In Clark v. Auto Recovery Bureau Conn., Inc., 889 F. Supp. 543, 547 (D. Conn. 1994), the court held that no breach of the peace occurred under Connecticut law when the debtor did not appear and object to the repossession until after the secured party's agents had taken possession of the car. *Id.*; *accord* James v. Ford Motor Credit Co., 842 F. Supp. 1202, 1209 (D. Minn. 1994) (applying Minnesota law), *aff'd*, 47 F.3d 961 (8th Cir. 1995).

[125] *Ivy*, 612 So. 2d at 1110 & nn.5, 9.

[126] *Id.* at 1112.

[127] 78 So. 2d 351, 352 (Miss. 1955).

[128] *Kirkwood*, 78 So. 2d at 352.

> conditional vendee, the retaking must occur with the knowledge of and without objection by the vendee . . . . The important factors of the sanctity of a private home from invasion by others, and the right of privacy require, we think, a different rule as to the right of repossession from that applied in those cases not involving a private residence.[129]

Apparently, the use of trickery or deceit to obtain possession is not a breach of the peace.[130] The Mississippi Supreme Court has observed in dictum, "Courts in other jurisdictions have generally held that the use of trickery or deceit to peaceably repossess collateral does not constitute a breach of peace."[131] In *Dearman v. Williams*, the secured party's collection agent went to the debtor's home to repossess an automobile.[132] The debtor was not at home, and the collection agent told the debtor's young son that he just wanted to look the car over. When the collector found the keys in the car, he told the debtor's son that it looked like his father had gotten the car ready for him and drove the car away.[133] Without addressing the issue directly, the Mississippi Supreme Court held that no breach of peace had taken place.[134] In another case, the court considered the debtor's allegation that the secured party's trickery and chicanery in obtaining the collateral was a breach of peace, but concluded that no substantial evidence existed of such trickery or chicanery.[135]

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[129] *Id.* at 356.

[130] One commentator has stated, "The courts have generally held that a little stealth is all in the game of repossession." CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 4.05[2][b], at 4-85; *see, e.g.*, Thompson v. Ford Motor Credit Co., 550 F.2d 256, 258-59 (5th Cir. 1977) (applying Alabama law); Benschoter v. First Nat'l Bank, 542 P.2d 1042, 1050 (Kan. 1975) (holding use of stealth does not constitute breach of peace), *appeal dismissed,* 425 U.S. 928 (1976); Cox v. Galigher Motor Sales Co., 213 S.E.2d 475, 479 (W. Va. 1975) (holding repossession through deceit does not amount to breach of peace). *But see* Ford Motor Credit Co. v. Byrd, 351 So. 2d 557, 559-60 (Ala. 1977) (secured party's act of luring debtor to secured party's office under false pretenses and then repossessing debtor's automobile constituted conversion). In addition, the Fair Debt Collection Practices Act prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(10) (1994).

[131] *Ivy*, 612 So. 2d at 1111.

[132] 109 So. 2d 316, 319 (Miss. 1959).

[133] *Dearman*, 109 So. 2d at 319.

[134] *Id.* at 321.

If a breach of the peace occurs, the debtor will be entitled to punitive damages if the debtor can prove that the secured party's actions were characterized by malice, fraud, oppression, or willful wrong evincing a disregard for the rights of others.[136] In *Ivy v. General Motors Acceptance Corp.*, the Mississippi Supreme Court stated:

> Thus, a creditor must do more than cause a mere breach of peace before he or she can be held liable for punitive damages. Restated, a breach of peace may be deemed tortious — for which the creditor will be held liable for actual and consequential damages — but the tortuousness of the conduct must rise to a *heightened level* before punitive damages may be imposed.[137]

The court in the same case acknowledged that Mississippi law provides little guidance about when punitive damages are justified.[138] In the *Ivy* case, the court concluded that the secured party's conduct "did not rise to the requisite heightened level of tortuousness to warrant imposition of punitive damages."[139] However, in *Commercial Credit Co. v. Spence*, in which the secured party broke the car's window to gain possession of the collateral, the court stated that "the offense is properly to be characterized as an aggravated and oppressive trespass, for which punitive damages are allowable in the discretion of the jury," and affirmed the jury's award of punitive damages[140] In *Kirkwood v. Hickman*, when the secured party entered the debtor's residence over objections and removed a stove, the court affirmed the award of punitive damages and stated, "[T]he intentional and high handed manner of the trespass warranted the jury in assessing punitive damages."[141]

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[135] Bradley v. Associates Discount Corp., 92 So. 2d 468, 471 (Miss. 1957).

[136] *Bradley*, 92 So. 2d at 472; *accord Ivy*, 612 So. 2d at 1118-19.

[137] *Ivy*, 612 So. 2d at 1118 (emphasis in original).

[138] *Id.* at 1119.

[139] *Id.*; *see also Bradley*, 92 So. 2d at 472 (same result).

[140] Commercial Credit Co. v. Spence, 184 So. 439, 442 (Miss. 1938).

d. Effect of Taking Possession of Other Property

When a secured party repossesses an automobile, it is not unusual for the debtor to allege that the debtor had other personal property in the automobile at the time of the repossession and that the secured party did not have a security interest in the personal property so that the secured party's act of taking possession of this other personal property constituted a conversion. Typically the courts have summarily dismissed such allegations as not supported by substantial evidence.[142] In *PACCAR Financial Corp. v. Howard*, the secured party who had repossessed a truck containing some of the debtor's personal property acknowledged that it had possession of other personal property belonging to the debtor in which the secured party did not have a security interest.[143] The secured party delivered this other personal property to a relative of the debtor, but did not seek to determine what the relative did with the personal property for ten months.[144] The debtor brought an action for conversion.[145] Although the debtor claimed that the personal property was worth only $1,576.16, the jury awarded the debtor $25,000.[146]

If the security agreement gives the secured party a security interest in accessions, the secured party's security interest should extend to sound systems, CB radios and other personal property attached to the collateral by the debtor.[147] In the *PACCAR* case, the court held that tires mounted on the truck by the debtor had become "fixtures of the collateral" (presumably accessions); therefore, the secured party was not liable for conversion of the tires.[148]

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[141] Kirkwood v. Hickman, 78 So. 2d 351, 356 (Miss. 1955).

[142] *See, e.g.*, Bowman v. Chrysler Credit Corp., 496 F. 2d 1322, 1322 (5th Cir. 1974) (denying debtor recovery for money claimed to be left in repossessed automobile); Dearman v. Williams, 109 So. 2d 316, 321 (Miss. 1959). In the *Dearman* case the collection agent drove the automobile directly to the seller's place of business, where several witnesses inspected the automobile and were able to testify at trial that there was no personal property in the car. *Dearman*, 109 So. 2d at 319.

[143] 615 So. 2d 583, 585 (Miss. 1993).

[144] *PACCAR*, 615 So. 2d at 585, 589.

[145] *Id.* at 585.

[146] *Id.* at 586. The Mississippi Supreme Court affirmed the jury's verdict but remanded the case to the trial court for reconsideration of the amount of damages. *Id.* at 590.

e. Liability of Secured Party for Acts of Independent Repossessor

The general rule is that one who contracts with an independent contractor is not liable for torts committed by the independent contractor.[149] But an exception exists to this general rule when the services to be performed entail some dangerous, illegal or tortious act.[150] Relying on this exception to the general rule, the Mississippi Supreme Court in *Hester v. Bandy* held that a secured party could be liable for the acts of an independent collection agent if the secured party could have reasonably anticipated that its independent contractor would commit a tort in repossessing the debtor's automobile.[151] In that case, the debtor brought an action for wrongful repossession against both the secured party and the repossessor hired by the secured party. After a jury verdict against both the secured party and the repossessor, the trial court granted the secured party a judgment notwithstanding the verdict in part, holding that the secured party could not be liable for the torts of his independent contractor.[152] On appeal, the Mississippi Supreme Court reversed and held that a jury issue was presented about whether the secured party could reasonably have anticipated that the repossessor would commit a tort while repossessing the debtor's automobile.[153] Courts in other states have held that the secured party's duty not to breach the peace is based on important public safety concerns and cannot be delegated by the secured party.[154]

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[147] *See* MISS. CODE ANN. § 75-9-314 (1981) (relating to security interests in accessions). In *Allied Equipment, Inc. v. Pee*, the secured party repossessed a tractor. Allied Equip., Inc. v. Pee, 284 So. 2d 528, 529 (Miss. 1973). The debtor contended that the tractor had a winch on it that belonged to the debtor's brother. *Allied Equip.*, 284 So. 2d at 529. The court only noted that the winch was covered by the secured party's security agreement at the time that the secured party repossessed and sold the tractor. *Id.* The case suggests that the value of the winch should have been considered in determining the fair market value of the tractor so that the debtor at least would get some credit for the addition to the value of the collateral. *Id.*

[148] *PACCAR*, 615 So. 2d at 590. One writer has suggested that secured parties add a provision to their security agreement requiring the debtor to notify the secured party within a fixed time of the repossession if other personal property has been taken. CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 4.05[2][b], at 4-87.

[149] *See* McKee v. Brimmer, 39 F.3d 94, 96 (5th Cir. 1994) (applying Mississippi law); Duggins v. Guardianship of Washington, 632 So. 2d 420, 426 (Miss. 1993); Hester v. Bandy, 627 So. 2d 833, 841 (Miss. 1993). *See generally* 41 AM. JUR. 2D *Independent Contractors* § 29 (1995) (stating and explaining general rule).

[150] *See* National Rating Bureau v. Florida Power Corp., 94 So. 2d 809, 811 (Fla. 1956); *Hester*, 627 So. 2d at 841. *See generally* 41 AM. JUR. 2D *Independent Contractors* § 33 (1995) (reciting exceptions to general rule).

[151] 627 So. 2d 833, 843 (Miss. 1993).

The Fair Debt Collection Practices Act does not apply to the actions of a secured party acting in its own name.[155] The Act does apply to the actions of collection agencies.[156] Notably, in states like Mississippi, in which the secured party can be liable for the torts of its collection agent, the secured party could be liable for the actions of its collection agent under the Act as well as under Mississippi law.[157]

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[152] *Hester*, 627 So. 2d at 838.

[153] *Id.* at 843.

[154] *See, e.g.*, Sammons v. Broward Bank, 599 So. 2d 1018, 1021 (Fla. Dist. Ct. App. 1992); Robinson v. Citicorp Nat'l Servs., Inc., 921 S.W.2d 52, 54-55 (Mo. Ct. App. 1996); Mauro v. General Motors Acceptance Corp., 626 N.Y.S.2d 374, 377 (N.Y. Sup. Ct. 1995); MBank El Paso, N.A. v. Sanchez, 836 S.W.2d 151, 154 (Tex. 1992). *See generally* Jay M. Zitter, Annotation, *Secured Transactions: Right of Secured Party to Take Possession of Collateral On Default Under UCC Section 9-503*, 25 A.L.R.5TH 696, 730 (1994) (collecting cases which hold duty not to breach peace is nondelegable).

[155] 15 U.S.C. § 1692(a)(6)(A) (1994).

[156] *Id.* § 1692(a)(6).

[157] *See* James v. Ford Motor Credit Co., 842 F. Supp. 1202, 1207 (D. Minn. 1994), *aff'd*, 47 F.2d 961 (8th Cir. 1995). In assuming that the secured party could be liable under the Fair Debt Collection Practices Act for the acts of its collection agents, the court relied on Minnesota law that the secured party's obligation to collect debts lawfully is nondelegable. *James*, 842 F. Supp. at 1207. In *James*, the secured party ultimately was not liable because its collection agents did not violate the Act. *Id.* at 1209.

f. Perfection by Repossession

A secured party whose financing statement has lapsed or whose security interest is otherwise unperfected can perfect its security interest by possession when the secured party repossesses the collateral.[158] However, this perfection is deemed to have taken place when the secured party repossesses the collateral and will not relate back to the date of the lapsed financing statement.[159]

3. Replevin

A secured party's judicial remedy to obtain possession of collateral is through a replevin action in circuit court.[160] The

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[158] *See* United States v. Williams, 82 B.R. 430, 434 (Bankr. N.D. Miss. 1988) (applying Mississippi law). A secured party can perfect a security interest in certain types of collateral by taking possession of the collateral. MISS. CODE ANN. § 75-9-305 (1981 & Supp. 1997).

[159] *See Williams*, 82 B.R. at 434.

[160] MISS. CODE ANN. §§ 11-37-101 to -157 (Supp. 1997). Section 11-37-101 provides a procedure by which a judge may issue a writ of replevin without a hearing if the plaintiff posts a bond. This statute originally provided that a judge shall issue a writ if the plaintiff posts a bond, but a federal district court held that this statute violated federal due process protections because it did not give the judge discretion to deny the writ. Wyatt v. Cole, 710 F. Supp. 180, 182 (S.D. Miss. 1989), *aff'd in part and rev'd on other grounds*, 928 F.2d 718 (5th Cir. 1991, *rev'd on other grounds*, 504 U.S. 158 (1992). In 1990 the Mississippi legislature amended section 11-37-101 to provide that a judge may issue the writ if the plaintiff posts the bond. 1990 Miss. Laws Ch. 344. The Mississippi Supreme Court has stated that the statute as revised meets due process requirements. Underwood v. Foremost Fin. Serv., 563 So. 2d 1387, 1389 (Miss. 1990). Nevertheless, many Mississippi attorneys think that the procedure authorized in section 11-37-101 remains unconstitutional because it allows seizure of the collateral without a hearing, and will only seek replevin under section 11-37-131, which requires a hearing prior to the issuance of the writ. *See generally* Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972) (stating due process requires notice and meaningful opportunity to be heard prior to seizure of debtor's property); Gary D. Spivey, Annotation, *Modern Views as to Validity, under Federal Constitution, of State Prejudgment Attachment, Garnishment and Replevin Procedures, Distraint Procedures under Landlord's or Innkeepers' Lien Statutes, and Like Procedures Authorizing Summons Seizure of Property*, 18 A.L.R. Fed. 223 (1974). The federal courts have held that other Mississippi statutes that allowed seizure of collateral without a prior hearing violated federal due process requirements. *See, e.g.*, Keelon v. Davis, 465 F. Supp. 204, 213 (N.D. Miss. 1979) (sequestration statute); Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 940 (S.D. Miss. 1977)

Mississippi Supreme Court has held that a security interest under the Uniform Commercial Code is not enforceable under the Summons and Seizure Act, found in sections 85-7-31 to -53 of the Mississippi Code.[161]

4. *Effect of Secured Party's Failure to Dispose of Collateral after Repossession*

It is important to remember that the secured party does not become the owner of the collateral when the secured party repossesses it.[162] The secured party must sell the collateral under section 75-9-504 or propose to retain the collateral in satisfaction of the indebtedness under section 75-9-505.[163] If the secured party attempts to sell the collateral without complying with the Uniform Commercial Code, the debtor may be entitled to recover damages from the secured party.[164] If the secured party retains the collateral and does not dispose of it within a commercially reasonable time, the secured party will be deemed to have elected to retain the collateral in satisfaction of the indebtedness and will be barred from bringing an action on the note under Mississippi law. That was the holding in *Millican v. Turner*, when the secured party repossessed an automobile that had deteriorated to the point that it had little value.[165] The secured party opted to bring an action on the note for the indebtedness rather than try to sell the automo-

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(attachment statute); *see also* Bender v. North Meridian Mobile Home Park, 636 So. 2d 385, 389-90 (Miss. 1994) (noting in dictum that attachment for rent statutes probably are unconstitutional because of lack of notice and hearing). *See generally* Guthrie T. Abbott, *Provisional and Final Remedies and Special Proceedings—Rules 64-71,* 52 MISS. L.J. 183, 183-87 (1982).

[161] Burns v. Delta Loans, Inc., 354 So. 2d 268, 270 (Miss. 1978).

[162] *See* Associates Discount Corp. v. Slayton, 86 So. 2d 509, 510 (Miss. 1956) (noting that replevin only gives secured party possession of collateral for purpose of enforcing security interest and does not make secured party owner of collateral).

[163] MISS. CODE ANN. §§ 75-9-504 to -505 (1981); *see* Snyder v. Bank One, Kentucky, N.A., 113 F.3d 774, 777 (7th Cir. 1997) (applying Kentucky law).

[164] *See* MISS. CODE ANN. § 75-9-507(1) (1981); *infra* text accompanying notes 322-26 (noting effect of secured party's failure to comply with Code).

[165] 503 So. 2d 289, 290 (Miss. 1987).

bile.[166] The Mississippi Supreme Court held that if the secured party takes possession of the collateral from the debtor, and does not sell or otherwise dispose of the collateral within a reasonable time, the secured party will be deemed to have elected to retain the collateral in satisfaction of the indebtedness and will be barred from bringing an action on the note.[167] This will be the case even though the secured party did not give the notice required to be given by a secured party under section 75-9-505(b) to retain collateral in satisfaction of the indebtedness.[168] The amount of time that constitutes a reasonable time for the secured party to dispose of the collateral is a question of fact. The court stated:

> Such a determination will depend, in each case, on various factors, including the type of collateral, how rapidly it depreciates, the market for such collateral, and other relevant circumstances. Often, the inquiry will be one requiring specialized knowledge, such that the testimony of an expert qualified by knowledge, skill, experience, training or education would be helpful to the trier of facts.[169]

In *Millican v. Turner*, the collateral was worth approximately $800, the indebtedness was approximately $2,600, and there was no other collateral for the loan.[170] Should the legal fiction adopted by the Mississippi Supreme Court in *Millican v. Turner*, also known as involuntary strict foreclosure, be applied when the secured party takes possession of and does not dispose in a timely manner of collateral of relatively small value in relation to the loan? For example, suppose the loan is $2,000,000 and is secured by numerous pieces of equipment. The debtor defaults, and the secured party takes possession of all of the collateral and sells all of it for $1,500,000, except for one piece of equipment with a value of approximately $1,000, which the secured party retains for an unreasonable time. A strict application of the involuntary strict foreclosure doctrine would be that the secured party is deemed to have retained the $1,000 piece of equipment in satisfaction of the entire $500,000 deficiency. This result would be an inequitable windfall for the debtor.[171] A more equitable rule would be to credit the indebtedness with the value of the collateral retained, and place the burden on the secured party to prove that it did not intend to keep the collateral in satisfaction of the indebtedness and that the value of the retained collateral is not equal to the indebtedness. This result would be consistent with the result in Mississippi when the secured party fails to give the debtor proper notice of a sale of collateral.[172]

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[166] *Millican*, 503 So. 2d at 291. Although the Mississippi Supreme Court has not considered this issue, a secured creditor should not be able to use the doctrine of involuntary strict foreclosure to circumvent the notice requirements of section 75-9-505(2) if the value of the collateral exceeds the indebtedness.

[167] *Id.*; *accord* Durdahl v. Bank of Casper, 718 P.2d 23, 28 (Wyo. 1986). *But cf.* General Elec. Capital Corp. v. Vashi, 480 N.W.2d 880, 882 (Iowa 1992) (holding secured party not deemed to have kept collateral in satisfaction of indebtedness when secured party did not dispose of collateral because no market existed for collateral).

[168] *Millican*, 503 So. 2d at 291. This aspect of *Millican v. Turner* has been criticized and rejected by other courts as a departure from the scheme of the Uniform Commercial Code. *See* Warnaco, Inc. v. Farkas, 872 F.2d 539, 544 (2d Cir. 1989) (applying Connecticut law); Allen v. Coates, 661 So. 2d 879, 885-86 & n.6 (Fla. Dist. Ct. App. 1995). The current draft of Revised Article 9 expressly rejects the theory of an implied election to retain the collateral in satisfaction of the indebtedness. Draft § 9-618(c). It will be interesting to see if the Mississippi legislature rejects *Millican v. Turner* by adopting this portion of Revised Article 9.

[169] *Millican*, 503 So. 2d at 291-92.

[170] *Id.* at 290. Estimates of the value of the collateral were $600 and $800.

D. Sale of Collateral

After default, the secured party "may sell, lease or otherwise dispose of the collateral."[173] If the secured party elects to sell the collateral, the secured party may do so by public or private sale. Section 75-9-504(3) of the Mississippi Code provides as follows:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one (1) or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect

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The indebtedness was $2,583.90 plus interest, fees and costs. *Id.*

[171] *See infra* text accompanying note 314.

[172] *See infra* text accompanying notes 219-20.

[173] MISS. CODE ANN. § 75-9-504(1) (1981).

> of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale; and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.[174]

1. *Care of Collateral Pending Sale*

The secured party's obligations regarding collateral in its possession are set out in section 75-9-207 of the Mississippi Code, including the general rule that "[a] secured party must use reasonable care in the custody and preservation of collateral in his possession."[175] The Mississippi Supreme Court has

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[174] MISS. CODE ANN. § 75-9-504(3) (1981). Section 75-9-504(3) conforms to the official text of section 9-504(3) of the Uniform Commercial Code. U.C.C. § 9-504(3), 3B U.L.A. 127 (1992).

[175] MISS. CODE ANN. § 75-9-207 (1981). In full, this statute provides:

> (1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.
>
> (2) Unless otherwise agreed, when collateral is in the secured party's possession
>
> (a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debt-

stated that this statute "preserves a well-established common law duty of a pledgee."[176] The duties imposed by this section on the secured party apply both when the secured party takes possession of collateral pursuant to a pledge agreement with the debtor as well as when the secured party repossesses collateral.[177]

Section 75-9-207(4) provides that a secured party may "use or operate the collateral for the purpose of preserving the collateral or its value."[178] In *Murray v. Payne*, the Mississippi Supreme Court held that when the secured party makes use of the collateral, the secured party must apply the profits from such use to reduce the secured indebtedness.[179] However, the secured party must apply only the net profits from the use of the collateral, not the gross receipts.[180]

> or and are secured by the collateral;
>
> (b) The risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;
>
> (c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;
>
> (d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;
>
> (e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.
>
> (3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.
>
> (4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

This statute is identical to the official text of section 9-207 of the Uniform Commercial Code. U.C.C. § 9-207, 3 U.L.A. 508 (1992).

[176] Vinson v. McCarty, 413 So. 2d 1026, 1030 (Miss. 1982). Prior to the adoption of the Uniform Commercial Code, a pledgee of commercial paper was deemed to be a trustee for the pledgor. Love v. Rogers, 150 So. 815, 815 (Miss. 1933).

[177] Murray v. Payne, 437 So. 2d 47, 54 n.8 (Miss. 1983).

[178] MISS. CODE ANN. § 75-9-207(4) (1981).

[179] *Murray*, 437 So. 2d. at 53.

[180] *Id.* at 54. *See generally* Francis M. Dougherty, Annotation, *Secured Party's Duty Under UCC § 9-207(2)(c) to Reduce Secured Obligation by Increase or Profits*

In a case in the United States Bankruptcy Court for the Northern District of Mississippi, after the debtor's default, the secured party transported its collateral, soybeans, from the debtor's farm to a third party for sale.[181] The soybeans were apparently damaged in the course of their removal and transportation. The secured party's employee testified that the secured party, the Commodity Credit Corporation, did not spend the money to remove and haul these soybeans "just right."[182] The court held that the secured party could not recover damages to the soybeans from the debtor and that the damage made an alleged deficiency remaining after the sale impossible to calculate.[183]

In a case between a franchisor and franchisee, the franchisor had possession and control of an account containing money to which the franchisee normally was entitled.[184] The franchisor made certain charges against the account, and the franchisee sought damages on the basis that the franchisor mishandled the account.[185] The Fifth Circuit Court of Appeals, applying Mississippi law, stated that if the franchisor and the franchisee had a fiduciary relationship, the franchisor had a duty to handle the money in the trust account "prudently and properly."[186] If no fiduciary relationship existed, the franchisor had a lesser duty of handling the account in a commercially reasonable manner under section 75-9-502(2).[187] It would not be

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Received From Collateral, 45 A.L.R.4TH 394 (1986).

[181] Jones v. United States (*In re* Jones), 107 B.R. 888, 891 (Bankr. N.D. Miss. 1989).

[182] *Jones*, 107 B.R. at 892.

[183] *Id.*; *see also In re* Severance Truck Line, Inc., 35 B.R. 332, 333 (Bankr. M.D. Fla. 1983). In this case, the collateral deteriorated after the secured party took possession of it. *In re Severance Truck Line*, 35 B.R. at 333. The court relied on the language of Florida's version of section 9-504(1), which provides that the secured party may dispose of collateral "in its then condition," to hold the secured party liable for the decline in value between repossession and sale. *Id.* (citing FLA. STAT. ANN. § 679.504 (1990)).

[184] Carter Equip. Co. v. John Deere Indus. Equip. Co., 681 F.2d 386, 393 (5th Cir. 1982) (applying Mississippi law).

[185] *Carter Equip. Co.*, 681 F.2d at 393.

[186] *Id.* at 394.

[187] *Id.*

a stretch for a court to apply the reasoning of this case to secured parties with possession of tangible personal property collateral, and hold that a secured party who was also a fiduciary of the debtor had a higher standard of care with regard to the collateral than the standard of care stated in section 75-9-207.

In *Duncan v. Coahoma Bank*, a bank took possession of its collateral, an automobile, and stored the automobile with a third party pending sale.[188] The automobile was severely damaged while in storage.[189] The bank subsequently exercised its right to set-off against the debtor's savings account with the bank.[190] The debtor brought an action against the bank alleging wrongful set-off by the bank.[191] The Mississippi Supreme Court held that the bank's set-off was not wrongful, but suggested in dictum that the bank may have liability to the debtor under section 75-9-207 for the damage to the automobile that occurred while the automobile was in the bank's possession.[192]

Section 75-9-504(1) of the Mississippi Code provides that the secured party may dispose of the collateral "in its then condition or following any commercially reasonable preparation or processing."[193] Although the Mississippi Supreme Court has not addressed this issue, courts in other states have held that this language may impose upon the secured party the obligation to clean or repair the property prior to sale.[194]

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[188] 397 So. 2d 891, 892 (Miss. 1981).

[189] *Duncan*, 397 So. 2d at 892.

[190] *Id.*

[191] *Id.* at 891. At trial the jury awarded the plaintiff $30,000. *Id.* at 892. The trial judge granted the bank's motion for a judgment notwithstanding the verdict. *Id.*

[192] *Id.* at 894.

[193] MISS. CODE ANN. § 75-9-504(1) (1981).

[194] *See, e.g.*, Liberty Nat'l Bank & Trust Co. v. Acme Tool, 540 F.2d 1375, 1381 (10th Cir. 1976) (applying Oklahoma law) (failing to clean and paint oil rig); Connex Press, Inc. v. International Airmotive, Inc., 436 F. Supp. 51, 55, 57 (D.D.C. 1977), *aff'd*, 574 F.2d 636 (D.C. Cir. 1978) (applying Maryland law) (failing to improve appearance of and repair airplane); Franklin State Bank v. Parker, 346 A.2d 632, 635 (N.J. Super. 1975) (failing to make minor repairs to car); Weiss v. Northwest Acceptance Corp., 546 P.2d 1065, 1072 (Or. 1976) (washing and cleaning equipment). The Reporters' Comments to section 9-610 of the Octo-

2. *Notice of Sale*

Unless (a) "collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market" or (b) the debtor has "signed after default a statement renouncing or modifying his right to notification of sale," the secured party must give to the debtor "reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale is to be made."[195]

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ber 1997 Draft of[194] Revised Article 9 provide as follows:

> A secured party may not dispose of collateral "in its then condition" when, taking into account the costs and probable benefits of preparation or processing and the fact that the secured party would be advancing the costs at its risk, it would be commercially unreasonable to dispose of the collateral in its then condition.

Draft § 9-610 cmt.

[195] MISS. CODE ANN § 75-9-504(3) (1981). For example, in one case a secured party was entitled to sell its collateral, consisting of Christmas toys, without notice because giving notice would have delayed the sale until after Christmas and the value of the toys would have declined steeply. American City Bank v. Western Auto Supply Co., 631 S.W.2d 410, 420-21 (Tenn. App. Ct. 1981). An example of collateral that is customarily sold on a recognized market, and thus can be sold without notice, is Ginnie May bonds. *See* Washburn v. Union Nat'l Bank & Trust Co., 502 N.E.2d 739, 742 (Ill. App. Ct. 1986). *See generally* Richard C. Tinney, Annotation, *Nature of Collateral Which Secured Party May Sell or Otherwise Dispose of Without Giving Notice to Defaulting Debtor Under UCC § 9-504(3)*, 11 A.L.R.4TH 1060 (1982). A waiver by the debtor of notice of sale is effective only if the waiver is in writing and given after default. *See* MISS. CODE ANN. § 75-9-504(3) (1981); McKee v. Mississippi Bank & Trust Co., 366 So. 2d 234, 236-37 (Miss. 1979). *See generally* Richard C. Tinney, Annotation, *Loss or Modification of Right to Notification of Sale of Repossessed Collateral Under Uniform Commercial Code § 9-504*, 9 A.L.R.4TH 522 (1981). In contrast to the requirements of notice imposed by the Uniform Commercial Code in a sale of personal property, the only notice required in a foreclosure of real property in Mississippi is that a notice of sale be posted in the courthouse and published in a local newspaper. *See* MISS. CODE ANN. § 89-1-55 (1991); Rivervalley Co. v. Deposit Guar. Nat'l Bank, 331 F. Supp., 698, 703, 707 (N.D. Miss. 1971); Guthrie T. Abbott, *Some Basic Priority Problems in a Land Development Project in Mississippi with Emphasis on Power of Sale Foreclosure Procedures*, 50 MISS. L.J. 665, 678-80 (1979). No notice is required to be mailed to the debtor or any junior creditors. *See* Crystal v. Duffy, 493 So. 2d 942, 944 (Miss. 1986); Abbott, *supra* at 680.

a. Contents of Notice of Sale

Section 75-9-504 does not specify the contents of the notice of sale, other than, as stated above, that the secured party must give "reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made."[196] The Mississippi Supreme Court has not addressed the question of what information must be in a notice of sale. However, another court has stated that a notice of private sale is sufficient when it advises the debtors (1) that the collateral had been repossessed, (2) that they have a right of redemption, and (3) that if the debtors do not redeem by a certain date, the collateral will be sold.[197] Furthermore, one commentator has stated that a notice of public sale should include (1) a description of the default, (2) reference to the note and security agreement, (3) the balance of the indebtedness and the right to redeem, (4) when and where the sale will take place, (5) the terms of the sale, and (6) a statement of the right to inspect the collateral prior to sale.[198]

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[196] MISS. CODE ANN. § 75-9-504(3) (1981). *See generally* Richard C. Tinney, Annotation, *Sufficiency of Secured Party's Notification of Sale or Other Intended Disposition of Collateral Under UCC § 9-504(3)*, 11 A.L.R.4TH 241 (1982). Revised Article 9 provides that in nonconsumer transactions, a notice is sufficient if it:

> (A) describes the debtor and the secured party;
>
> (B) describes the collateral that is the subject of the intended disposition;
>
> (C) states the method of intended disposition;
>
> (D) states that the debtor [or secondary obligor] is entitled to an accounting of the unpaid indebtedness and states the charge, if any for an accounting; and
>
> (E) states the time and place of a public sale or the time after which any other disposition is to be made, whether or not the notification contains additional information.

Draft § 9-613(a)(1). Revised Article 9 also provides sample forms of notice. *Id.* §§ 9-613(a)(3), 9-613(b)(2).

[197] Cessna Fin. Corp. v. Meyer, 575 P.2d 1048, 1051-52 (Utah 1978).

[198] *See* CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 4.08[7][e], at 4-143 to -144. The notice to potential bidders should not contain a description of the default or of the indebtedness since each may chill bidding. *Id.* at 4-144 n.501.

b. Notice in Writing

The Mississippi Supreme Court has held that the notice to the debtor required by section 75-9-504(3) must be in writing.[199] Verbal notice of the proposed sale is inadequate.[200]

c. Notice to Co-obligors, Guarantors and Owners

Section 75-9-105(d) defines "debtor" as "the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral."[201] In *United States v. Bryant*, the United States District Court for the Northern District of Mississippi held that two co-obligors on a note, who had sold their interest in the collateral prior to the foreclosure sale, were entitled to notice of the sale of the collateral under section 75-9-504(3) even though they no longer had any interest in the collateral.[202]

The definition of "debtor" in section 75-9-105(d) further provides:

> Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.[203]

The effect of this part of the definition of "debtor" is that if the debtor is not the owner of the collateral being foreclosed upon, the secured party must give notice of the sale to the owner. This situation would arise, for example, when one corporation granted a security interest in its property to secure the indebtedness of a related corporation, or when the debtor owned the collateral at the time it granted the security interest but later sold the collateral to a third party.[204] The owner of the collateral also would have a right to redeem it before the sale or other disposition[205] and, likewise, would have the right to bring an action against the secured party for failing to comply with the Code in disposing of the collateral.[206]

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[199] *McKee,* 366 So. 2d at 238; *accord* Jones v. United States (*In re* Jones), 107 B.R. 888, 895-96 (Bankr. N.D. Miss. 1989).

[200] *McKee,* 366 So. 2d at 238. *Accord Jones,* 107 B.R. at 895-96.

[201] MISS. CODE ANN. § 75-9-105(d) (1981 & Supp. 1997). *See generally* Annotation, *Construction of Term "Debtor" As Used in UCC § 9-504(3), Requiring Secured Party to Give Notice to Debtor of Sale of Collateral Securing Obligation,* 5 A.L.R.4TH 1291 (1981).

[202] United States v. Bryant, 628 F. Supp. 1444, 1446 (N.D. Miss. 1986) (applying Mississippi law); *accord* First Nat'l Bank v. Cillessen, 622 P.2d 598, 600 (Colo. Ct. App. 1980) (applying Colorado law).

[203] MISS. CODE ANN. § 75-9-105(d) (1981).

Although the Mississippi Supreme Court has not addressed this issue, courts in other states have held that a guarantor of an indebtedness is a "debtor" under section 9-105(d) and section 9-504(3) of the U.C.C., and that section 9-504(3) of the U.C.C. requires the secured party to give notice to any guarantor.[207]

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[204] *See* Summit Petroleum Corp. v. Ingersoll-Rand Fin. Corp., 909 F.2d 862, 866 (6th Cir. 1990) (applying Kentucky law); Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1377 (11th Cir. 1982) (applying Alabama law); Security Pac. Nat'l Bank v. Goodman, 100 Cal. Ct. Rptr. 763, 769-70 (Cal. App. 1972). What if the secured party does not know that the debtor has sold the collateral? Unlike the land recording system, there typically would be no public record of a sale of personal property, except for vehicles or other titled personal property. The secured party has certain duties to the owner of the collateral but only when the secured party knows that the collateral is owned by a person other than the debtor. MISS. CODE ANN. § 75-9-112 (1981). Presumably the secured party would not be required to give notice of the sale to the owner when the secured party did not know that someone other than the debtor owned the collateral. Revised Article 9 provides that the secured party owes no duty to a new owner unless the secured party knows about the new owner. Draft § 9-605.

[205] MISS. CODE ANN. § 75-9-112(c) (1981) (allowing owner who is not debtor right to redeem).

[206] *Id.* (allowing owner who is not debtor right to obtain injunctive or other relief for secured party's failure to comply with Code).

[207] *See, e.g.*, Hollander v. California Mfg. Enter., Inc., 51 Cal. Rptr. 2d 694, 696 (Cal. Ct. App. 1996); Branan v. Equico Lessors, Inc., 342 S.E.2d 671, 674 (Ga. 1986); Bexar County Nat'l Bank v. Hernandez, 716 S.W.2d 938, 939 (Tex. 1986) (entitling co-guarantor to notice when guarantor took assignment of bank's security and foreclosed). *See generally* Annotation, *Construction of Term "Debtor" As Used in UCC § 9-504(3), Requiring Secured Party to Give Notice to Debtor of Sale of Collateral Securing Obligation*, 5 A.L.R.4TH 1291 (1981). The debtor, including guarantors, cannot waive the secured party's obligation to give notice of sale. MISS. CODE ANN. § 75-9-501(3) (1981).

d. Notice to Other Creditors

After describing the notice to be given to the debtor, section 75-9-504(3) addresses the extent of the obligation of the foreclosing secured party to give notice to other secured parties and lien creditors. In pertinent part, section 75-9-504(3) states:

> In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of interest in the collateral.[208]

Under this statute, the foreclosing secured party does not have any obligation to search the records for liens or other security interests, or to notify lien creditors or secured parties who do not give notification of their interest to the foreclosing secured party, even if the foreclosing secured party knows of such interests.[209] An exception to this rule is that the foreclosing secured party must give notice to the Internal Revenue Service if the foreclosing secured party wants to extinguish subordinate federal tax liens.[210]

e. Delivery and Second Try

The notice can be hand-delivered to the debtor or sent by mail.[211] When the notice is mailed to the debtor's address, the notice will be sufficient.[212] However, if the secured party knows that the debtor did not receive the notice, the secured party has an obligation to make an additional effort to notify the debtor.[213]

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[208] MISS. CODE ANN. § 75-9-504(3) (1981).

[209] As a matter of practice, secured parties usually search the records and send notice of sale to all junior lienors and junior secured parties with recorded financing statements or liens. Revised Article 9 will require secured parties to send notices of sale to any secured party which has a filed financing statement covering the collateral. Draft § 9-611(b)(2).

[210] I.R.C. § 7425(b) (1996). The notice must be given by registered or certified mail or by personal service not less than twenty-five days prior to the sale. I.R.C. § 7425(c)(1) (1996).

[211] *See* McKee v. Mississippi Bank & Trust Co., 366 So. 2d 234, 238 (Miss. 1979).

[212] *McKee*, 366 So. 2d at 238.

The secured party can act to its detriment by giving more notices than are necessary. In *McKee v. Mississippi Bank & Trust Co.*, the secured party obtained, after default, a statement from the debtor waiving notice of the secured party's sale of the collateral.[214] On October 12, the secured party sent the debtor a notice that the debtor could redeem the car before the sale.[215] When the secured party learned that the debtor had not received the October 12 letter, the secured party sent the debtor a second letter on October 19 stating that the debtor had until October 29 to redeem the collateral.[216] On October 25, the secured party sold the car.[217] The court held that even if the debtor's waiver of notice was valid, the secured party's subsequent notices operated as an abandonment of the waiver.[218]

f. Effect of Failing to Give Notice

The failure to give the required notice to the debtor does not invalidate the sale.[219] However, if the secured party seeks a deficiency judgment against the debtor after the sale, the secured party would have the burden of proving that the foreclosure sale conformed with reasonable commercial practices and that the collateral was sold for its fair market value.[220]

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[213] *See* Fidelity Fin. Servs., Inc. v. Stewart, 608 So. 2d 1111, 1114 (Miss. 1992). In this case, the debtors shared a mailbox with three other families. *Fidelity*, 608 So. 2d at 1112. A person other than one of the debtors signed for the certified mail notice of sale and testified that she did not give the notice to the debtors. *Id.* The court stated that the mail return receipt which was signed and certified established a rebuttable presumption that the debtors had received notice of the sale, but that the debtors rebutted the presumption by proving that they did not sign the return receipt and that the person who did sign for the letter did not give the letter to them. *Id.* at 1113.

[214] *McKee*, 366 So. 2d at 235.

[215] *Id.*

[216] *Id.* at 235-36.

[217] *Id.* at 236.

[218] *Id.* at 237.

[219] *See* United States v. Bryant, 628 F. Supp. 1444, 1446 (N.D. Miss. 1986) (applying Mississippi law); Walker v. V.M. Box Motor Co., 325 So. 2d 905, 906 (Miss. 1976). Courts in some other states have held that the secured party's failure to give proper notice bars any deficiency. *See* Wilmington Trust Co. v. Conner, 415 A.2d 773, 779 (Del. 1980); Chittenden Trust Co. v. Maryanski, 415 A.2d 206, 210 (Vt. 1980); Gary D. Spivey, Annotation, *Uniform Commercial Code:*

3. *Commercially Reasonable Sale*

Section 75-9-504(3) of the Mississippi Code provides that a sale may be "at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."[221] The secured party enjoys a statutory presumption that its foreclosure sale is commercially reasonable if he "sells the collateral in the usual manner in any recognized market therefore or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold."[222] However, this presumption can be rebutted if the secured party fails to comply with the requirements of section 75-9-504(3).

The Mississippi Supreme Court and federal courts applying Mississippi law have infrequently addressed the issue of what constitutes a "commercially reasonable" sale.[223] The elements of a commercially reasonable sale which the courts have noted in the cases discussed below are (1) the notice to the debtor, (2) the extent to which the secured party seeks competitive bids for the property, and (3) the obtaining of an appraisal of the value of the property prior to sale as a basis for the secured party's bid.[224] The issue of the commercial reasonableness of a

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Failure of Secured Creditor to Give Required Notice of Disposition of Collateral as Bar to Deficiency Judgment, 59 A.L.R.3D 401 (1974).

[220] *See Bryant*, 628 F. Supp. at 1446-47; Jones v. United States (*In re* Jones), 107 B.R. 888, 896 (Bankr. N.D. Miss. 1989) (applying Mississippi law); *McKee*, 366 So. 2d at 237; *Walker*, 325 So. 2d at 906.

[221] MISS. CODE ANN. § 75-9-504(3) (1981).

[222] MISS. CODE ANN. § 75-9-507(2) (1981).

[223] *See generally* Richard Tinney, Annotation, *What is "Commercially Reasonable" Disposition of Collateral Required by UCC § 9-504(3)*, 7 A.L.R.4TH 308 (1981).

[224] As discussed in the text, these factors are relevant regardless of whether

sale typically surfaces when a secured party seeks a deficiency judgment after a sale.[225]

In a pre-Code case, *Commercial Credit Equipment Corp. v. Kilgore*, the trial court dismissed a secured party's deficiency action because the secured party first advertised for a public sale and then held a private sale.[226] In addition, the trial court dismissed the action because the court found that the sale price of the collateral was so inadequate that it constituted fraud.[227] The Mississippi Supreme Court reversed and remanded the case for trial.[228] The court noted that the secured party had the right to sell the collateral at a public or private sale and that prior to the private sale, the secured party obtained an appraisal of the equipment, sent notices to ten equipment dealers seeking a purchaser, notified the debtors and their attorneys, and posted notices in three places, one of which was the courthouse at which the sale was held.[229]

In *Allied Equipment, Inc. v. Pee*, the seller of a tractor repossessed the tractor after the buyer failed to make the payments due.[230] The seller posted notices of the public sale and notified the buyer.[231] No other bidders appeared at the sale.[232] The seller bought the tractor at the sale for $17,500, based on an appraisal by the seller's employee, and then sought to recover the deficiency of $14,776.23.[233] At trial the buyer argued that the tractor was worth $25,000, and the jury returned a verdict for the buyer.[234] The Mississippi Supreme Court reversed and held that the price was not so inadequate

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the secured party conducts a public or private sale. *See generally* Boyd J. Peterson, Annotation, *Secured Transactions: What is Public or Private Sale Under UCC § 9-504(3)*, 60 A.L.R.4TH 1012 (1988).

[225] *See infra* text accompanying notes 293-97.

[226] 221 So. 2d 363, 366 (Miss. 1969).

[227] *Commercial Credit*, 221 So. 2d at 366.

[228] *Id.*

[229] *Id.*

[230] 284 So. 2d 528, 528-29 (Miss. 1973).

[231] *Allied Equip.*, 284 So. 2d at 529.

[232] *Id.*

[233] *Id.*

[234] *Id.*

as to be fraudulent, and that the low price did not keep the sale from being commercially reasonable.[235]

In *Ford Motor Credit Co. v. Mathis*, the secured party repossessed an automobile, sold it at a "dealers only" auction, and then sought to recover the deficiency from the debtor.[236] The trial court granted the debtor's motion for summary judgment on the basis that such a sale was calculated to generate a wholesale price rather than a retail price and, therefore, failed to meet the commercially reasonable standard.[237] On appeal, the Mississippi Supreme Court reversed and remanded. The court noted, "The wholesale disposition of repossessed collateral is commercially reasonable if it is 'consistent with ordinary commercial practice among dealers.'"[238] The court reviewed case law from other states that upheld the commercial reasonableness of these types of sales, and further stated, "When the factors of manner, method, time, place and terms of sale are considered, the disposition of repossessed property at a dealer-only wholesale auction may very well be commercially reasonable. This is a question for the finder of fact in a particular case."[239]

In *Jones v. United States*, a case in the United States Bankruptcy Court for the Northern District of Mississippi, the secured party damaged the soybeans used as collateral for its loan in the course of removing them from the debtor's place of business,[240] and then left the soybeans piled up in an open building for almost six weeks prior to the sale.[241] Although evidence of the public sale existed, there was no evidence in the record of the contents of the advertisement or the extent of circulation of the advertisement.[242] The secured party did not notify the debtor of the sale.[243] The court could not determine whether the selling price of the soybeans was adequate because of the damage to the soybeans.[244] Although the secured party did not violate the terms of the security agreement, the court, applying Mississippi law, stated that the sale was "totally devoid of any hint of commercial reasonableness," and the secured party could not recover the deficiency.[245]

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[235] *Id.* at 529-30; *see also* MISS. CODE ANN. § 75-9-507(2) (1981) ("The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by a secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.")

[236] 660 So. 2d 1273, 1273-74 (Miss. 1995).

[237] *Mathis*, 660 So. 2d at 1275.

[238] *Id.* (*quoting* JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 27-11 (3d ed. 1988 & Supp. 1994)); *see also* MISS. CODE ANN. § 75-9-507(2) (1981) (presuming commercial reasonableness exists if secured party has sold "in conformity with reasonable commercial practices among dealers in the type of property sold").

[239] *Mathis*, 660 So. 2d at 1277.

[240] 107 B.R. 888, 892 (Bankr. N.D. Miss. 1989).

[241] *Jones*, 107 B.R. at 896.

The same court upheld the commercial reasonableness of a sale of farm equipment in *In re Whatley*.[246] In this case, the secured party posted public notices of the sale and sent copies of the notices to the debtor's attorney, the attorney for another secured party and local equipment dealers.[247] The secured party had the equipment appraised prior to the foreclosure sale.[248] Even though the secured party was the only bidder at the foreclosure sale, and sold the equipment the next day for over one and one-half times the amount it bid at the foreclosure sale, the court held that the foreclosure sale was commercially reasonable.[249]

4. *Priority of Interests in Sale Proceeds*

If the foreclosure sale produces sufficient proceeds to pay off all of the debtor's creditors with a security interest in or lien against the collateral, the creditors' relative priorities are not important. But if, as is more commonly the case, the proceeds of the sale are less than the aggregate secured indebtedness, the priorities of the parties are determinative of which secured party gets paid. A complete discussion of priorities among secured parties and lien creditors is beyond the scope of this article, but some general rules will be discussed.

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[242] *Id.* at 894.
[243] *Id.* at 895.
[244] *Id.* at 896.
[245] *Id.*
[246] 126 B.R. 231 (Bankr. N.D. Miss. 1991).
[247] *In re Whatley*, 126 B.R. at 233.
[248] *Id.*
[249] *Id.* at 234, 236.

One issue that the Uniform Commercial Code leaves open is whether a junior secured party who forecloses must pay the proceeds of the sale to the senior secured party.[250] Nothing in Article 9 expressly states that the junior secured party has to pay any portion of the sales proceeds to a senior secured party, nor is there any provision that states the senior secured party's security interest attaches to the proceeds of the foreclosure sale.[251] Section 75-9-504(1) of the Mississippi Code does not list a senior secured party among the persons entitled to the proceeds of sale. Some courts in other states have held that a senior secured party is not entitled to any proceeds of a sale by a junior secured party, and the junior secured party must apply the proceeds of the sale to discharge its own indebtedness and then pay any surplus over to the debtor.[252] Other courts have held that the senior secured party's security interest continues in the proceeds of the sale, and a junior secured party who forecloses must pay the proceeds of sale over to senior secured parties.[253] Although the Mississippi Supreme Court has never expressly addressed this issue in a reported case, both the Mississippi Supreme Court and courts applying Mississippi law have assumed that the senior secured party's security interest attaches to the proceeds of sale, and that if a junior secured party forecloses, that junior secured party must pay the proceeds of the sale to any senior secured parties and senior lien creditors of the debtor in the order of their priority before the junior secured party may apply any of the proceeds of sale to its own indebtedness.[254]

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[250] *See generally* CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 4.06[4], at 4-99 to -101 (discussing application of sale proceeds); Cynthia Starnes, *UCC Section 9-504 Sales by Junior Secured Parties: Is a Senior Party Entitled to Notice and Proceeds?* 52 U. PITT. L. REV. 563, 572-74 (1991) (discussing distribution of sale proceeds).

[251] *See* MISS. CODE ANN. § 75-9-504(1) (1981) (describing application of proceeds of disposition of collateral); C. Edward Dobbs, *Enforcement of Article 9 Security Interests—Why So Much Deference to the Junior Secured Party?* 28 LOY. L.A. L. REV. 131, 134 (1994).

[252] *See, e.g.*, Continental Bank v. Krebs, 540 N.E.2d 1023, 1026 (Ill. Ct. App. 1989) (noting nothing in statute requires or even authorizes application of proceeds in satisfaction of senior security interest); First Union Nat'l Bank v. Tecatmar, 235 S.E.2d 894, 896 (N.C. Ct. App. 1977) (holding that plaintiff improperly conducted foreclosure sale). Revised Article 9 provides that the junior secured party has no obligation to apply the proceeds of sale to satisfy the indebtedness of the senior secured party. Draft § 9-614(i). Of course, unless the junior secured party pays off the senior secured party, the sale by the junior secured party will have no effect on the security interest of the senior secured party. *See* MISS. CODE ANN. § 75-9-504(4) (stating purchaser at sale takes free of security interest under which sale is made and any security interest subordinate thereto); *accord* Draft § 9-615(a) & (d).

[253] *See, e.g.*, New Hampshire Bus. Dev. Corp. v. F.R. Lepage Bakery, Inc., 832

a. Unperfected and Junior Security Interests

A secured party whose security interest is unperfected can still exercise any of the remedies the Code grants to a secured party.[255] However, its rights in the collateral will be subject to the rights of secured parties and lien creditors.[256] For exam-

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F.2d 7, 10 (1st Cir. 1987) (applying New Hampshire law); Delaware Truck Sales, Inc. v. Wilson, 618 A.2d 303, 308 (N.J. 1993); Consolidated Equip. Sales, Inc. v. First State Bank & Trust Co., 627 P.2d 432, 438 (Okla. 1981); *see also* MISS. CODE ANN. § 75-9-306(2) (1981 & Supp. 1997) (stating security interest continues in proceeds of sale).

[254] *See, e.g., In re* Whatley, 126 B.R. 231, 236 (Bankr. N.D. Miss. 1981) (assuming that party with priority entitled to proceeds from foreclosure sale); United States v. Williams (*In re* Williams), 82 B.R. 430, 434 (Bankr. N.D. Miss. 1988) (citing Pennsylvania case for proposition that when proceeds of sale are not sufficient to satisfy senior secured party's security interest, senior secured party retains all proceeds of sale); Huss v. University Handbag Co., 241 So. 2d 344, 345 (Miss. 1970) (holding judgment creditor had first priority in proceeds of sale conducted by unperfected secured party). In contrast, when a second priority deed of trust is foreclosed, the trustee must apply the proceeds of sale, first, to pay off its indebtedness; second, to pay off any third priority deed of trust; and third, any remaining surplus goes to the debtor. *See* Stinson v. Nichols (*In re* Crosby), 185 B.R. 28, 30-31 (Bankr. S.D. Miss. 1993) (applying Mississippi law), *aff'd*, 185 B.R. 33 (S.D. Miss. 1994); Reese v. Ivey, 324 So. 2d 756, 757 (Miss. 1976) (holding that trustee had no authority to pay off first deed of trust). The trustee has no authority to pay any proceeds of sale to the first priority deed of trust. *Stinson*, 185 B.R. at 30; *see also* Mississippi Hill & Delta Sav. & Loan Ass'n v. Valley Bank, 392 So. 2d 1126, 1128 (Miss. 1981) (noting that separate methods of disposition of proceeds exist for real and personal property foreclosures).

[255] *See* MISS. CODE ANN. § 75-9-201 (1981) (stating security agreement is effective between parties and creditors); Matter of Hadad, 409 F. Supp. 106, 109 (S.D. Miss. 1970) (applying Mississippi law).

[256] *See* MISS. CODE ANN. § 75-9-301(1) (1981 & Supp. 1991) (stating unperfect-

ple, in *United States v. Williams*, a bank financed the purchase of a tractor and perfected its purchase money security interest by filing.[257] The debtor subsequently granted a security interest in all of its equipment, including the tractor, to the Farmers Home Administration (FHA), which also perfected its security interest by filing.[258] The bank's financing statement lapsed after five years and the bank became unperfected.[259] The

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ed security interest is subject to perfected security interest and lien creditors); *see, e.g.*, Borg-Warner Acceptance Corp. v. Fedders Fin. Corp. (*In re* Hammons), 614 F.2d 399, 405-06 (5th Cir. 1980) (applying Mississippi law) (holding that secured party that filed financing statement in wrong county was unperfected and junior in priority to subsequent perfected security interest); Ray v. City Bank & Trust Co., 358 F. Supp. 630, 641 (S.D. Ohio 1973) (applying Mississippi law) (rights of purchaser of collateral superior to unperfected security interest); International Harvester Co. v. Peoples Bank & Trust Co., 402 So. 2d 856, 861, 865 (Miss. 1981) (holding security interest perfected by possession of instrument had priority over unfiled notice of federal tax lien). One respected authority on the Uniform Commercial Code has recommended that the drafters of Revised Article 9 change the priority rules so that an unperfected security interest would have priority over lien creditors. James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823 (1993). The purpose of such a change would be to reduce litigation in bankruptcy, where the bankruptcy trustee is given the powers and priority of a hypothetical lien creditor. *Id.* at 825. The drafters of Revised Article 9 declined Professor White's suggestion and have maintained the priority of lien creditors over unperfected security interests. Draft § 9-315(a).

[257] 82 B.R. 430, 431 (Bankr. N.D. Miss. 1988).

[258] *Williams*, 82 B.R. at 431.

[259] *Id.*; *see also* MISS. CODE ANN. § 75-9-403(2) (1981 & Supp. 1997) (filing of financing statement is effective for five years from date of filing). Prior to the adoption of the Uniform Commercial Code, the rule in Mississippi was that a purchase money interest in personal property retained priority over all other creditors of the debtor as long as the property remained in the hands of the purchaser or one claiming through the purchaser, without the necessity of any filing by the purchase money creditor. *See* Weiss, Dreyfous & Seiferth v. Natchez Inv. Co., 140 So. 736, 739 (Miss. 1932). The statute upon which this rule was based was repealed in 1966, when Mississippi adopted the Uniform Commercial Code. *See supra* note 1 and accompanying text. Under the Code, if the purchase money secured party fails to file its financing statement within twenty days (amended from ten days), or if the purchase money secured party allows its financing statement to lapse, it will lose the purchase money priority and will be subject to prior perfected secured parties or lien creditors. *See* MISS. CODE ANN. § 75-9-312(4) (stating priority of purchase money security interest); Ford Motor Credit Co. v. State Bank & Trust Co., 571 So. 2d 937, 940 (Miss. 1990) (holding bank that failed to file financing statement had unperfected purchase money security interest that was junior in priority to perfected security interest of floor plan

bank repossessed and sold the tractor.[260] The court held that while the sale was valid, the FHA's perfected security interest had priority over the bank's unperfected security interest and that the FHA was, therefore, entitled to all of the proceeds of the sale.[261]

The decision of the United States Bankruptcy Court for the Northern District of Mississippi in *In re Whatley*[262] not only illustrates what happens when a junior secured party forecloses, but also makes the distinction between the foreclosure sale and a subsequent sale to a third party. In this case, a bank and

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financier); Peoples Bank & Trust Co. v. Comfort Eng'g Co., 408 So. 2d 1190, 1193 (Miss. 1982) (holding seller which failed to file its financing statement within ten days lost purchase money status and lost priority to bank's existing perfected security interest); *see also Huss*, 241 So. 2d at 345 (holding creditor who asserted purchase money lien but failed to file financing statement within ten days lost priority in proceeds of sale to existing judgment creditor). In contrast, a purchase money mortgage on real property will have priority over any other existing interests in the real property. *See* MISS. CODE ANN. § 89-1-45 (1991). One Mississippi case suggests that a purchase money mortgage on real property only has this superiority when the seller takes back a mortgage on the real property to secure the purchase price, and not when a third party lends the purchaser the money to purchase the property. In that case, the Mississippi Supreme Court stated, "In order for a purchase-money lien to exist, the relation of vendor and vendee must also exist, and the debt must constitute a part of the money used, or to be used, in payment for the property so purchased." Welsh v. Thigpen, 159 So. 101, 103 (Miss. 1935). The Internal Revenue Service has determined that a properly perfected purchase money security interest or purchase money mortgage will have priority over an existing federal tax lien against the vendee. Rev. Rul. 68-57, 1968-1 C.B. 553.

[260] *Williams*, 82 B.R. at 431-32. The bank forwarded to the FHA only the proceeds of the sale in excess of the bank's secured indebtedness. *Id.* at 432.

[261] *Id.* at 434-35. The bank argued that its repossession of the tractor constituted perfection by possession. *Id.* The court held that even if that were the case, the re-perfected security interest did not relate back to the time that the bank's financing statement lapsed, and the bank's re-perfected security interest, therefore, was still subject to the FHA's filed financing statement. *Id.* at 435. In contrast, while a deed of trust may lose priority to subsequent creditors and purchasers under section 89-5-19, the deed of trust will never lose priority to persons who became creditors or purchasers before the deed of trust begins to lose priority to subsequent creditors and purchasers. MISS. CODE ANN. § 89-5-19 (1991) (stating statute only benefits subsequent creditors and purchasers); *see* Richter Phillips Co. v. Phillips, 166 So. 393, 395 (Miss. 1936); Bank of Lexington v. Cooper, 76 So. 659, 663 (Miss. 1917).

[262] 126 B.R. 231 (Bankr. N.D. Miss. 1991) (applying Mississippi law).

the Small Business Administration (SBA) litigated their respective priorities in a debtor's farm equipment.[263] The bankruptcy court held that the bank had priority and could foreclose on the collateral pending the SBA's appeal.[264] The bank foreclosed and purchased the farm equipment at the foreclosure sale for $25,000.[265] The next day, the bank put the equipment up for auction, and received net proceeds from the auction of approximately $40,000.[266] The bankruptcy court's judgment regarding priority subsequently was reversed by the district court, which held that the SBA's security interest had priority over the bank's security interests.[267] The bank paid the SBA only the $25,000 for which it purchased the equipment at the foreclosure sale.[268] The SBA filed a motion in the bankruptcy court to require the bank to turn over the additional $15,000 that the bank obtained from the auction sale.[269] Since the SBA's security interest in the equipment had priority over the bank's security interest, the SBA was entitled to the $25,000 from the foreclosure sale.[270] But since the foreclosure sale and the price paid by the bank at the foreclosure sale were commercially reasonable and not part of a "contrived scheme" to defraud the SBA, the court held that the bank was entitled to retain the additional $15,000 that it garnered from the auction sale.[271]

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[263] *In re Whatley*, 126 B.R. at 233.

[264] *Id.*

[265] *Id.* at 234.

[266] *Id.*

[267] *In re Whatley*, 126 B.R. at 234.

[268] *Id.* The gross proceeds from the auction were $46,202.50, but the bank deducted its expenses of sale of approximately $6,000, and the SBA did not challenge the deduction. *Id.*

[269] *Id.*

[270] *Id.* This issue is not expressly addressed in the court's opinion; presumably the parties and the court assumed that the SBA, as the senior priority interest, was entitled to the net proceeds from the bank's foreclosure sale.

[271] *Id.* at 235-36. In contrast, when a mortgagee foreclosed on real property and purchased the real property at the foreclosure sale for $1,458.86, the amount of the indebtedness, and then sold the real property twelve days later to a third party for $4,000, the Mississippi Supreme Court held that the mortgagee was required to pay to the mortgagor the difference between the two prices. Central

b. Landlord's Lien

The Uniform Commercial Code does not apply to a landlord's lien.[272] A separate statute provides that a landlord's lien "shall be subject to all prior liens or other security interests perfected according to law."[273] This means that a perfected security interest has priority over a landlord's lien.[274] The only exception to this rule is when the landlord's lien extends to agricultural products of the land.[275] The landlord's lien on agricultural products has priority over all other liens,[276] including a prior perfected security interest.[277]

c. Mechanics' Liens

Section 75-9-310 of the Mississippi Code gives the holder of a mechanic's lien priority over an existing perfected security interest. This statute provides, in relevant part, as follows:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.[278]

Fin. Serv., Inc. v. Spears, 425 So. 2d 403, 405-06 (Miss. 1983).

[272] MISS. CODE ANN. § 75-9-104(b) (1981 & Supp. 1997).

[273] MISS. CODE ANN. § 89-7-51(2) (1991 & Supp. 1997). For reasons that are undoubtedly apparent and satisfactory to itself, the Mississippi legislature has created a special landlord's lien for rent on personal property stored in a self-storage facility (aka mini-warehouse). MISS. CODE ANN. § 85-7-121 to -29 (1991). This lien "is superior to any other lien or security interest except those which are perfected and recorded in Mississippi prior to the date of default under the rental agreement and except any tax lien as otherwise provided by law." MISS. CODE ANN. § 85-7-123 (1991).

[274] *See* Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024, 1027 (Miss. 1990).

[275] *Sklar*, 555 So. 2d at 1027.

[276] MISS. CODE ANN. § 89-7-51(1).

[277] *See* Sunburst Bank v. Findley (*In re* Findley), 76 B.R. 547, 556 (Bankr. N.D. Miss. 1987) (stating "landlord's crop lien is paramount to all other liens").

[278] MISS. CODE ANN. § 75-9-310 (1981). This statute conforms to the official text of section 9-310 of the Uniform Commercial Code. *See* U.C.C. § 9-310, 3A

The requirement that the mechanic must retain possession of goods to have priority over perfected security interests in those goods has generated much litigation.[279] Courts in other states have held that if the debtor takes equipment to a mechanic who repairs the equipment and then returns the equipment to the debtor, the mechanic loses its claim to priority over the secured party with an existing perfected security interest in the equipment.[280] If the debtor subsequently brings the equipment back to the mechanic a second time for repairs, and the mechanic then retains possession, the mechanic will have a priority lien over the secured party for the amount of the second set of repairs, but not the first set of repairs.[281]

However, in Mississippi, the rule is different. In *Thorp Commercial Corp. v. Mississippi Road Supply Co.*, the Mississippi Supreme Court held that when a mechanic worked on a tractor and returned it to the debtor, and the debtor subsequently returned the tractor to the mechanic, the mechanic's lien for the cost of the repairs retained its priority over the

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U.L.A. 325 (1992). This superiority existed under Mississippi law prior to the adoption of the U.C.C. *See* Commercial Sec. Co. v. Kriner, 53 So. 2d 92, 93 (Miss. 1951); De Van Motor Co. v. Bailey, 171 So. 342, 343-44 (Miss. 1936). The policy behind giving mechanics this priority is that they enhance and preserve the value of the collateral and prevent its deterioration. *Commercial Sec. Co.*, 53 So. 2d at 93; *De Van Motor Co.*, 171 So. at 343; U.C.C. § 9-310, 3A U.L.A. 325, Official Comment No. 1 (1992).

[279] *See generally* CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 3.07[3][b], at 3-78 to -80 (discussing possession under Uniform Commercial Code); David B. Sweet, Annotation, *Loss of Garageman's Lien on Repaired Vehicles by Owner's Use of Vehicle*, 74 A.L.R.4TH 90, 95-97 (1989) (discussing possession requirement for mechanics); Gary D. Spivey, Annotation, *Secured Transactions: Priorities as Between Previously Perfected Security Interest and Repairman's Lien on Motor Vehicle Under Uniform Commercial Code*, 69 A.L.R.3D 1162, 1172-75 (1976) (discussing prerequisites to lien priority).

[280] *See, e.g.*, Balzer Mach. Co. v. Klineline Sand & Gravel Co., 533 P.2d 321, 324 (Or. 1975); Ford Motor Credit Co. v. Howell Bros. Truck & Auto Repair, Inc., 325 So. 2d 562, 564 (Ala. Ct. App. 1975).

[281] *See, e.g.*, United States v. Crittenden, 600 F.2d 478, 480 (5th Cir. 1979) (applying Georgia law); *In re* Lott, 196 B.R. 768, 776 (Bankr. W.D. Mich. 1996) (applying Michigan law); *In re* Glenn, 20 B.R. 98, 101 (Bankr. E.D. Tenn. 1982) (applying Tennessee law).

seller's existing perfected security interest.[282] Although this decision has been criticized for being outside of the mainstream of decisions interpreting the possession requirement,[283] it, perhaps, is justifiable because, under Mississippi's mechanic's lien statutes, the mechanic retains a lien even if the mechanic parts with possession of the equipment to which the lien attaches. Therefore, the exception in section 75-9-310 when "the lien is statutory and the statute expressly provides otherwise," may apply.[284]

d. Vehicles

A security interest in a motor vehicle must be perfected under the Mississippi Motor Vehicle Title Law.[285] Therefore, a secured party who attempts to perfect a security interest in a motor vehicle under Article 9 will be considered an unperfected secured party and will be junior in priority to a secured party which has perfected its security interest under the Motor Vehicle Title Law.[286]

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[282] Thorp Commercial Corp. v. Mississippi Road Supply Co., 348 So. 2d 1016, 1018 (Miss. 1977) (en banc); *accord* ITT Indus. Credit Co. v. Robinson, 350 So. 2d 48, 52 (Miss. 1977) (following *Thorp*); *see also* MISS. CODE ANN. § 85-7-101 (1991) (creating mechanic's lien). *See generally* Larry D. Moffett, Note, *Liens—Priority Under Uniform Commercial Code Section 9-310—Artisan's Lien Takes Priority Over Prior Perfected Security Interest Notwithstanding Lack of Continuous Possession of Repaired Property*, 48 MISS. L.J. 1113, 1113-22 (1977) (discussing *Thorp* holding).

[283] CLARK, SECURED TRANSACTIONS UNDER THE UCC ¶ 3.07[3][b], at 3-79; Jessie L. Evans, Note, *Commercial Law Priorities Under UCC 9-310 Relinquishing and Regaining Possession of Repaired Equipment*, 1 MISS. COL. L. REV. 67 (1978). One court has expressly rejected the reasoning of the majority in *Thorp* and adopted the reasoning of the dissent that the Uniform Commercial Code did not intend for the debtor to be able to choose which secured party had priority. *In re Glenn*, 20 B.R. at 101 (applying Tennessee law). *But see* M & I Western State Bank v. Wilson, 493 N.W.2d 387, 391-92 (Wis. Ct. App. 1992) (following *Thorp* and rejecting *In re Glenn*, holding mechanic did not lose priority when mechanic allowed debtor to take vehicle so that debtor could earn money to pay mechanic).

[284] *See* MISS. CODE ANN. § 85-7-105 (1991) (providing that holder of mechanic's lien retains lien after losing possession as long as property remains in hands of the owner). The *Thorp* court cited this statute but did not expressly rely on the statute in its holding. *Thorp*, 348 So. 2d at 1017. Courts applying the laws of other states have held that a nonpossessory statutory lien had priority over a perfected security interest when the statute which created the lien did not require possession. *See, e.g.*, First Maryland Leasecorp. v. M/V Golden Egret, 764 F.2d 749, 757 (11th Cir. 1985) (applying Alabama law) (watercraft lien); Brazier Forest Indus., Inc. v. Northern Transport, Inc. (In re Brazier Forest Prod., Inc.), 724 P.2d 970, 979 (Wash. 1986) (ruling on logger's lien).

[285] MISS. CODE ANN. §§ 63-21-1 to -77 (1996).

e. Buyers of Collateral

Section 75-9-307 provides that a buyer in the ordinary course of business "takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."[287] However, this statute makes an exception for buyers of farm products from a person engaged in farming operations,[288] in which case the secured party's security interest continues in the farm products.[289] The secured party can recover from the buyer of the farm products for conversion if the buyer resells the farm products without accounting to the secured party.[290]

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[286] *Id.* § 63-21-43 (1996); Regan v. Citizens Bank, 675 So. 2d 1239, 1241 (Miss. 1996); *see also* Orix Credit Alliance, Inc. v. Heard Family Trucking, Inc., 177 B.R. 68, 73 (S.D. Miss. 1994), *aff'd*, 41 F.3d 1027 (5th Cir. 1995) (applying Mississippi law) (stating security interest perfected under Alabama motor vehicle laws remained perfected when motor vehicle was brought into Mississippi and had priority over lien of bankruptcy trustee).

[287] MISS. CODE ANN. § 75-9-307 (1981 & Supp. 1997). *See generally* Richard C. Tinney, Annotation, *Who is "Buyer in Ordinary Course of Business" Under Uniform Commercial Code*, 87 A.L.R.3D 11 (1978); Allan E. Korpela, Annotation, *Who is "Person in Business of Selling Goods of That Kind" Within Provision of UCC § 1-201(9) Defining Buyer in Ordinary Course of Business for Purposes of UCC § 9-307(1)*, 73 A.L.R.3D 338 (1976).

[288] MISS. CODE ANN. § 75-9-307 (1981 & Supp. 1997).

[289] *Id.*; *see id.* § 75-9-306(2) (1981 & Supp. 1997) (security interest continues in collateral notwithstanding sale).

[290] *See, e.g.*, First Bank v. Eastern Livestock Co., 886 F. Supp. 1328, 1331 (S.D. Miss. 1995) (applying Mississippi law); United States v. Harrell's Stockyards, Inc., 652 F. Supp. 452, 453 (S.D. Miss. 1987) (applying Mississippi law); Oxford Prod. Credit Ass'n v. Dye, 368 So. 2d 241, 242 (Miss. 1979) (holding that perfected security interest in cotton crop follows sale of crop to cotton buyer who purchases from farmer). The Mississippi Secretary of State has adopted a special filing system for farm products that potential buyers of farm products can check. MISS. CODE ANN. § 75-9-319 (Supp. 1997). In addition, the Mississippi legislature has adopted additional protections for buyers of farm products. *Id.* § 75-9-307(4) (Supp. 1997).

5. *Deficiency*

Section 75-9-504(2) provides, "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency."[291] Under this statute, the debtor remains liable for the difference between the secured indebtedness and the proceeds of the foreclosure sale, absent some defense.[292] One such defense to a deficiency is the secured party's failure to comply with the requirements of section 75-9-504(3), such as a failure to act in a commercially reasonable manner or a failure to give notice of the sale to the debtor.[293] However, a rebuttable presumption exists that the secured party acted in a commercially reasonable manner.[294] If the debtor challenges the commercial reasonableness of the sale, the burden shifts to the secured party to prove that the sale was commercially reasonable.[295] If the secured party fails to give the required notice to the debtor or otherwise fails to comply with the Code, the secured party is not barred from obtaining a deficiency, but the secured party loses the presumption of commercial reasonableness.[296] In order to recover a deficiency judgment, the secured party has the burden of proving that (a) the sale conformed to reasonable commercial practices, and (b) the sum for which the secured party sold the collateral represented the collateral's fair market value.[297]

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[291] MISS. CODE ANN. § 75-9-504(2) (1981). In the case of a consumer goods secured transaction, Revised Article 9 requires the secured party to give the debtor an explanation of how the deficiency is calculated before or when the secured party makes demand for payment of the deficiency. Draft § 9-614A.

[292] *See* Jones v. Deposit Guar. Nat'l Bank, 427 So. 2d 97, 98 (Miss. 1983) (explaining that secured party entitled to deficiency after foreclosure sale barring defenses); Chaney v. General Motors Acceptance Corp., 349 So. 2d 519, 522 (Miss. 1977) (calculating that secured party is entitled to deficiency equal to indebtedness less value of collateral at time of sale). In one case the secured creditor purchased the collateral at its own foreclosure sale for an amount in excess of the appraised value of the property. The secured party subsequently sought a deficiency from the debtor based on the difference between the amount of the loan and the appraised value of the property it purchased. The court refused to calculate the deficiency in this manner and held that the deficiency properly was calculated as the difference between the amount of the loan and the price the secured party bid at the foreclosure sale, which calculation produced a substantially lower deficiency. Roosevelt Savings Bank v. Walter, 32 U.C.C. Rep. Serv. 2d 367, 369 (N.Y. Sup. Ct. 1996).

[293] *See supra* note 220. Revised Article 9 provides that a person's liability for a deficiency is not affected if the secured party failed to comply with the Code because the secured party did not know that a person was a debtor or a secondary obligor. Draft § 9-627.

[294] *See supra* text accompanying note 223. As noted above, section 75-9-507(2) provides a presumption of commercial reasonableness in certain circumstances. MISS. CODE ANN. § 75-9-507(2) (1981). The Mississippi Supreme Court seems to assume, without stating, that this presumption exists in every sale. *See, e.g.*, Ford Motor Credit Co. v. Mathis, 660 So. 2d 1273, 1277 (Miss. 1995) (discussing factors of commercial reasonableness); Murray v. Payne, 437 So. 2d 47, 50 n.2 (Miss. 1983) (recognizing that liquidation of collateral by secured party must be commercially reasonable); McKee v. Mississippi Bank & Trust Co., 366 So. 2d 234, 237

A buyer of goods can assert breach of warranty as a defense to a deficiency action brought by the seller or the seller's assignee.[298]

(Miss. 1979). *See generally* Gary D. Spivey, Annotation, *Uniform Commercial Code: Burden of Proof as to Commercially Reasonable Disposition of Collateral*, 59 A.L.R.3D 369 (1974) (describing commercial reasonableness). Revised Article 9 adopts this rebuttable presumption. Draft § 9-625.

[295] *Mathis*, 660 So. 2d at 1277. In an action for a deficiency following a foreclosure of real property, the lender must prove that every aspect of the foreclosure was commercially reasonable. Wansley v. First Nat'l Bank, 566 So. 2d 1218, 1224-25 (Miss. 1990). The lender also must prove that he tried to collect all of its indebtedness through the sale of the property. Federal Land Bank v. Wolfe, 560 So. 2d 137, 141 (Miss. 1989).

[296] *See* United States v. Bryant, 628 F. Supp. 1444, 1446 (N.D. Miss. 1986) (applying Mississippi law); Walker v. V.M. Box Motor Co., 325 So. 2d 905, 906 (Miss. 1976). *See supra* text accompanying notes 223-24. Courts in other states have held that the secured party's failure to conduct a commercially reasonable foreclosure sale is an absolute bar to any deficiency. *See generally* Richard C. Tinney, Annotation, *Failure of Secured Party to Make "Commercially Reasonable" Disposition of Collateral Under UCC § 9-504(3) as Bar to Deficiency Judgment*, 10 A.L.R.4TH 413 (1981) (analyzing various states' rulings on lack of commercial reasonableness).

[297] *Bryant*, 628 F. Supp. at 1446-47; Jones v. United States (*In re* Jones), 107 B.R. 888, 896 (Bankr. N.D. Miss. 1989); *McKee*, 366 So. 2d at 237; *Walker*, 325 So. 2d at 906. The fact that the secured party cannot recover a deficiency is not necessarily the end of the road for the secured party. In one case, a court held that even though a secured party had been barred from collecting a deficiency because of defects in the sale of part of its collateral, the indebtedness remained unsatisfied and the secured party still could repossess other collateral for its loan. Fleming v. Carroll Publ'g Co., 621 A.2d 829, 834 (D.C. 1993).

[298] *See* Jones v. Deposit Guar. Nat'l Bank, 427 So. 2d 97, 99 (Miss. 1983); Morrow v. Barron Motor Co., 90 So. 2d 20, 22-23 (Miss. 1956).

If the collateral was owned by someone other than the debtor at the time the secured party sold the collateral, the former owner is not liable for any deficiency remaining after the sale.[299]

If the secured indebtedness is an installment note, or a series of notes of three or more,[300] the statute of limitations for bringing an action on any deficiency is one year from the date of the foreclosure sale.[301] This one-year statute of limitations applies even when an entity other than the debtor owned the property upon which the secured party foreclosed.[302] If the secured indebtedness was not an installment note or series of notes, the statute of limitations for bringing an action for deficiency is three years.[303]

E. Retaining Collateral in Satisfaction of Indebtedness

As an alternative to conducting a foreclosure sale of the collateral under section 75-9-504, the secured party who has possession of collateral may elect to retain the collateral in satisfaction of the indebtedness.[304] Section 75-9-505(2) allows the secured party to propose to the debtor that the secured party retain the collateral in satisfaction of the indebtedness.[305] The secured party must send written notice of this proposal to the debtor and to any other secured party from whom the secured party has received written notice of an interest in the collateral.[306] However, there is no requirement that the secured party send notice to other secured parties who have filed financing statements covering the collateral.[307] If no one who is entitled to notice objects within twenty-one days after the notice is sent, the secured party may retain the collateral in satisfaction of the secured indebtedness.[308] The result of this is the secured creditor will become the owner of the collateral, all subordinate security interests are cut off,[309] and the debtor's right of redemption will be extinguished.[310] However, if the secured party does receive an objection from anyone

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[299] *See* MISS. CODE ANN. § 75-9-112 (1981).

[300] A "series of notes of three or more" means "multiple notes given in a single transaction and for the same consideration, and without regard to their several maturity dates," or "a series of notes wherein provision had been made for payment of a single indebtedness in portions to be evidenced by several promissory notes." Peoples Bank & Trust Co. v. Kinsey, 385 So. 2d 615, 617-18 (Miss. 1980). It does not mean a succession of unrelated notes. *Kinsey*, 385 So. 2d at 618.

[301] *See* MISS. CODE ANN. § 15-1-23 (1995). This statute provides as follows:

> In all cases, no suit or action shall hereafter be commenced or brought upon any installment note, or series of notes of three or more, whether due or not, where said note or notes are secured by mortgage, deed of trust, or otherwise, upon any property, real or personal, unless the same is commenced or brought within one year from the date of the foreclosure or sale of the property pledged as security for said note or notes.

In contrast, the statute of limitations for enforcing a guaranty is the general three-year statute of limitations. *See* First Nat'l Bank v. Drummond, 419 So. 2d 154, 159-60 (Miss. 1982); *see also supra* text accompanying notes 9-15 (discussing statutes of limitations for actions on promissory notes).

[302] *See* Commercial Agency v. Loe, 667 F. Supp. 359, 367 (S.D. Miss. 1987) (applying Mississippi law).

[303] *See* MISS. CODE ANN. § 15-1-49(1) (1995).

[304] *See generally* Maurice T. Brunner, Annotation, *Construction and Operation*

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of UCC § 9-505(2) Authorizing Secured Party in Possession of Collateral to Retain It in Satisfaction of Obligation, 55 A.L.R.3D 651 (1974).

[305] MISS. CODE ANN. § 75-9-505 (1981). This statute conforms to section 9-505 of the official text of the Uniform Commercial Code. *See* U.C.C. § 9-505, 3B U.L.A. 352 (1992).

[306] MISS. CODE ANN. § 75-9-505(2) (1981). Note that the definition of "debtor" includes any guarantors and owners of the collateral. *See id.* § 75-9-105(d) (1981 & Supp. 1997) (defining "debtor"); *see also id.* § 75-9-112 (1981) (declaring owner of collateral entitled to notice under section 75-9-505); *supra* text accompanying notes 201-06 (explaining that there are persons other than debtor to whom notice of sale must be given). The definition of "secured party" does not include lien creditors. *Compare* MISS. CODE ANN. § 75-9-105(m) (defining secured party) *with* MISS. CODE ANN. § 75-9-301(3) (1981 & Supp. 1997) (defining lien creditor).

[307] Revised Article 9 requires the foreclosing secured party give notice to other secured parties who have filed financing statements covering the collateral. Draft § 9-611(b)(2).

[308] MISS. CODE ANN. § 75-9-505(2) (1981).

[309] Neither section 75-9-505(2) nor section 9-505(2) of the Uniform Commercial Code expressly states this. But since retaining the collateral in satisfaction of the indebtedness is an alternative to a sale under section 75-9-504(3), the same results should apply. *See* 9 HAWKLAND, *supra* note 6, § 9-505:10, at 785. Revised Article 9 provides that subordinate security interests are discharged when the secured party retains the collateral in satisfaction of the indebtedness, regardless of whether the holder of the subordinate security interest was entitled to notice. Draft § 9-620(a). However, a subordinate federal tax lien will not be extinguished unless the secured party has given the statutory notice to the Internal Revenue Service. I.R.C. § 7425(c)(1) (1994).

[310] MISS. CODE ANN. § 75-9-506 (1981).

entitled to notice, the secured party must conduct a foreclosure sale under section 75-9-504.[311] The secured party therefore should make its proposal to retain the collateral within a sufficient time in order to allow a commercially reasonable sale if any objections are lodged by the debtor or another secured party entitled to notice.[312]

This remedy can enable the secured party to assign ownership of the collateral more quickly and with less expense than through a public sale under section 75-9-504(3) and without the risk of a subsequent challenge on the grounds of commercial reasonableness. But the usefulness of this remedy is limited in a number of ways. First, the statute only permits the secured party to exercise this remedy if the secured party has possession of the collateral.[313] Second, retention of the collateral satisfies the secured party's entire indebtedness; the secured party cannot retain collateral in satisfaction of a part of its indebtedness and then pursue other remedies to collect the balance.[314] Third, the secured party's title in the collateral remains subject to other secured parties with senior priority in the collateral and, possibly, lien creditors.[315]

As noted above, the Mississippi Supreme Court in *Millican*

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[311] *Id.*

[312] Vogel v. Carolina Int'l, Inc., 711 P.2d 708, 712 (Colo. Ct. App. 1985).

[313] Revised Article 9 does not require the secured party to have possession of the collateral. Draft § 9-618(b).

[314] CLARK, SECURED TRANSACTIONS UNDER THE U.C.C. ¶ 4.10[3], at 4-84 to -85; HAWKLAND, *supra* note 6, § 9-505:08, at 780-813. Revised Article 9 allows a secured party to accept collateral in partial satisfaction of the secured obligation with the debtor's consent. Draft § 9-618(d)(1).

[315] Relying on the fact that section 9-505(2) does not require the secured party to give notice to lien creditors, but only to secured parties, one court has held that the interests of lien creditors are not cut off if a secured party retains the collateral in satisfaction of its indebtedness. Oliver v. Bledsoe, 7 Cal. Rptr. 2d 382, 385-87 (Cal. Ct. App. 1992). An extension of the reasoning of this case would be that the purchaser's title would be subject to the interests of any party not entitled to notice under section 9-505(2). Revised Article 9 provides that subordinate interests are discharged whether or not the secured party was required to give notice to the owner of the subordinate interest. Draft § 9-620(b). Revised Article 9 requires the secured party to give notice to any lienholder whose lien is recorded. Draft § 9-619(2). Any subordinate lien will be discharged. Draft § 9-620(a).

v. Turner[316] held that a secured party who takes possession of collateral and holds it for an unreasonable amount of time without disposing of it under section 75-9-504 will be deemed to have elected to retain the collateral in satisfaction of the indebtedness, despite the absence of any written notice to the debtor or other secured parties required by section 75-9-505(2).

Section 75-9-505(1) provides that if the collateral is consumer goods and the debtor has paid sixty percent of the cash price of a purchase money security interest or sixty percent of the loan if the security interest is not a purchase money security interest, the secured party cannot retain the collateral in satisfaction of the indebtedness, but must sell the collateral under section 75-9-504.[317] Interestingly, section 75-9-505 does not address whether the secured party can retain collateral other than consumer goods in which the debtor has equity. In the absence of any restriction such as a restriction concerning the one in section 75-9-505(1) for consumer goods, the secured party presumably can retain collateral with a value in excess of its indebtedness absent timely objection from the debtor or another party entitled to notice.[318]

F. Redemption After Sale

As discussed previously, prior to sale by the secured party pursuant to section 75-9-504, the debtor has a limited right to reinstate an installment indebtedness and redeem the collateral by tendering to the secured party all past due installments plus the secured party's costs in retaking, holding and preparing the collateral for sale.[319] The debtor also is required to tender the secured party's attorney's fees and expenses, if the security agreement so provides.[320] Except for this limited right to reinstate an installment indebtedness, the debtor has no right to redeem the collateral before or after the sale.[321]

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[316] 503 So. 2d 289 (Miss. 1987).

[317] MISS. CODE ANN. § 75-9-505(1) (1981).

[318] Cerasoli v. Schneider, 311 A.2d 880, 884 (Del. Super. Ct. 1973).

[319] MISS. CODE ANN. § 75-9-504 (1981). *See supra* text accompanying notes 193-94 (explaining secured party's obligation to prepare collateral for sale).

[320] MISS. CODE ANN. § 75-9-506 (1981).

G. *Debtor's Remedies for Secured Party's Failure to Comply With Code*

If the secured party fails to comply with the Code, section 75-9-507(1) entitles the debtor to have the sale restrained, presumably through an injunction.[322] If the sale already has taken place, the debtor is entitled to recover from the secured party the debtor's loss caused by the secured party's failure to comply.[323] When the collateral is consumer goods, the debtor is entitled to recover statutory damages equal to ten percent of the principal.[324]

The secured party's failure to comply with the Code can adversely affect its right to recover a deficiency after a sale under section 9-504(2).[325] When the collateral is owned by someone other than the debtor, the owner is entitled to seek injunctive or other relief for the secured party's failure to comply with the Code.[326]

IV. LOANS SECURED BY REAL AND PERSONAL PROPERTY

Special problems arise when a loan is secured by real and personal property. Most loans secured by commercial real estate also will cover personal property used in connection with the real property. This personal property may be merely incidental, such as office and maintenance equipment, but for projects such as hotels, hospitals, health clubs and restaurants, a substantial portion of the value of the project can be personal property. Mississippi's version of Article 9 of the Uniform Commercial Code governs the disposition of the personal property. Therefore, any failure on the part of the secured party to comply with Article 9, could be disastrous to the secured party's recovery of its indebtedness.

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[321] The Internal Revenue Service has a right to redeem up to 120 days after a sale that extinguishes a federal tax lien. I.R.C. § 7425(d) (1994).

[322] MISS. CODE ANN. § 75-9-507(1) (1981).

[323] MISS. CODE ANN. § 75-9-507(1); *see, e.g.,* Chen v. Profit Sharing Plan of Dr. Donald H. Bohne, P.A., 456 S.E.2d 237, 240-41 (Ga. Ct. App. 1995) (debtor entitled to recover damages when secured party failed to give notice of its intent to retain collateral in satisfaction of indebtedness); Trapp v. Hancuh, 530 N.W.2d 879, 888-89 (Mich. Ct. App. 1995) (debtor entitled to recover damages when secured party failed to give notice of sale).

[324] *Id.* If the collateral is consumer goods, the debtor is entitled to recover statutory damages on "an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price." *Id.*

[325] *See supra* text accompanying notes 294-98.

[326] MISS. CODE ANN. § 75-9-112(d) (1981).

A. *Foreclosing on Real and Personal Property Together*

If a secured party's deed of trust contains a security agreement covering the secured party's personal property collateral,[327] the secured party can foreclose jointly on the real and personal property under Mississippi's laws on real property.[328] In this case the secured party would not have to comply with the notice[329] and "commercially reasonable" requirements[330] of section 75-9-504(3), but would have only to give notice and conduct the sale in the manner required for real property foreclosures.[331]

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[327] One court has stated that section 9-501(4) requires that one document must cover both real and personal property; in other words, the secured party cannot take advantage of section 9-501(4) if one document covers real estate only and another document grants a security interest in personal property only. Interstate Elec. Supply Co. v. Contractors & Eng'rs, Inc., 515 N.E.2d 182, 186 (Ill. App. Ct. 1987).

[328] MISS. CODE ANN. § 75-9-501(4) (1981). This statute leaves a number of issues unresolved. For example, should the security interest in the deed of trust be granted to the beneficiary or to the trustee? If the security interest was granted to the trustee, the financing statement also must name the trustee as the secured party. If the security interest was granted to the trustee only, and the beneficiary sought to substitute a new trustee, the original trustee presumably would have to assign the security interest and financing statement to the new trustee. One court has held that section 9-501(4) was intended to be used when the real and personal property collateral are closely related elements of a single business, such as the real and personal property that make up a hotel. *See* Aspen Enters., Inc. v. Bodge, 44 Cal. Rptr. 2d 763, 768 (Cal. Ct. App. 1995). In this case, the court held that it would not be commercially reasonable to conduct a single sale of real and personal property collateral under real estate law when the personal property consisted of an inventory of tires and the real property consisted of the debtor's residence, since potential purchasers of the residence probably would not be interested in purchasing tires and potential purchasers of the tires probably would not be interested in purchasing the residence. *Aspen Enters.*, 44 Cal. Rptr. 2d at 769.

[329] *See supra* text accompanying notes 195-218 (notice requirements).

[330] *See supra* text accompanying notes 221-49 (requirement of commercial rea-

The secured party with a deed of trust on real property and a security interest in related personal property of the debtor alternatively could seek foreclosure of all of its collateral in a judicial foreclosure proceeding.[332] However, judicial foreclosures are rare in Mississippi because Mississippi's nonjudicial foreclosure procedures are relatively quick and inexpensive.[333]

B. *Separate Sales of Real and Personal Property*

The secured party's remedies against its real and personal property are cumulative. The secured party can sell either its real or personal property first and, if its indebtedness remains unsatisfied, proceed against the other.[334]

If the secured party chooses to foreclose separately upon the real and personal property, the secured party must proceed with caution. First, is it commercially reasonable to sell the real and personal property separately?[335] The value of the re-

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sonableness).

[331] MISS. CODE ANN. § 89-1-55 & -57 (1991) (nonjudicial foreclosures). Presumably this would simply require the secured party to list the personal property in its notice of sale along with the description of the real property.

[332] MISS. CODE ANN. § 11-5-93 to -103 (1991) (judicial foreclosures). A secured party can bring an action for judicial foreclosure of personal property only. *See* MISS. CODE ANN. § 75-9-501(1) (1981).

[333] The Mississippi Supreme Court has stated, "It may be safely said that the courts and the business world favor nonjudicial foreclosure sales." Mississippi Hill & Delta Sav. & Loan Ass'n v. Valley Bank, 392 So. 2d 1126, 1128 (Miss. 1981).

[334] *See* Federal Deposit Ins. Corp. v. Hulsey, 22 F.3d 1472, 1485 (10th Cir. 1994) (applying Oklahoma law). Revised Article 9 adds a provision that a secured party may exercise its right under the Code without prejudicing its rights under real property law. Draft § 9-604(a). Revised Article 9 also adds a provision addressing foreclosing on fixtures. Draft § 9-604(b).

[335] In the pre-Code case of *Wheeler v. Cleveland State Bank*, the secured party sold the real and personal property of a plantation at separate sales. Wheeler v. Cleveland State Bank, 164 So. 400, 401 (Miss. 1935). The debtor argued that the personal property was necessary to the operation of the real property and should not have been sold separately. *Wheeler*, 164 So. at 401. The Mississippi Supreme Court noted that the security agreement gave the secured party the right to sell the personal property separately and rejected the debtor's argument. *Id.* at 402.

al and personal property together, as a going concern, usually is higher than their separate liquidation values.[336] Second, assuming that the secured party wanted to sell the real and personal property to the same person, how will the secured party foreclose upon the personal property? The secured party's choices are a public sale or a private sale[337] or retention of the personal property in satisfaction of the indebtedness.[338] If the secured party elects to retain the collateral in satisfaction of the indebtedness, it necessarily would lose the right to pursue any deficiency, and its title to the personal property may be subject to lien creditors and any secured parties who were not entitled to notice of the secured party's proposal to retain the collateral in satisfaction of the indebtedness.[339] If a third party purchased the real property at the foreclosure of the real property, the secured party could conduct a private sale of the personal property to the third party; but if the secured party must purchase the real property at the foreclosure of the real property, as is usually the case, the secured party would not be able to conduct a simultaneous private sale to itself because the secured party itself could not purchase the collateral at a private sale.[340] The secured party may be left with no alternatives other than a public sale of the personal property collateral simultaneously with or shortly after the foreclosure of the real property. If relations between the secured party and the debtor were hostile, as usually is the case, prior to the real property foreclosure, the secured party may not have access to the personal property for the purpose of conducting an inventory and appraisal of the personal property; preparing the personal property for sale, and making the personal property available for inspection by prospective purchasers.[341] If the secured party did conduct a separate public sale after purchasing the real property, the risk would exist that a third party would show up and buy the personal property, leaving the secured party with the real property but not the personal property; or that no one would show up at the sale, in which case the adequacy of the notice and the commercial reasonableness of the sale would be at issue.

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[336] Conversely, if separate sales of the real and personal property collateral would bring higher prices, it may not be commercially reasonable to hold a single sale of both the real and personal property collateral. Aspen Enters., Inc. v. Bodge, 44 Cal. Rptr. 2d 763, 768-69 (Cal. Ct. App. 1995).

[337] MISS. CODE ANN. § 75-9-504(3) (1981); *see supra* text accompanying notes 173-249 (discussing sales of collateral).

[338] MISS. CODE ANN. § 75-9-505(2) (1981); *see supra* text accompanying notes 304-18 (discussing retention of collateral).

[339] *See supra* text accompanying note 315.

[340] MISS. CODE ANN. § 75-9-504(3) (1981).

The fact that the Mississippi Supreme Court has adopted the doctrine of involuntary strict foreclosure[342] creates additional risks in separate foreclosures of real and personal property collateral. For example, if the secured party took possession of some or all of its personal property collateral first, and retained some or all of such collateral for an unreasonable amount of time before proceeding against its real estate collateral, the secured party may be deemed to have elected to retain this personal property collateral in satisfaction of its indebtedness, and thereby, be barred from foreclosing on the real property.[343] Similarly, suppose that the secured party foreclosed on its real property collateral, took possession of the real and personal property collateral, and failed to conduct a separate sale of the personal property within a reasonable time. The secured party may be deemed to have elected to retain the personal property in satisfaction of its indebtedness and be barred from seeking a deficiency.[344]

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[341] *See supra* text accompanying notes 193-94 (explaining secured party's obligation to prepare collateral for sale).

[342] *Millican*, 503 So. 2d at 291; *see supra* text accompanying notes 165-72 (discussing doctrine of involuntary strict foreclosure).

[343] *See* Durdahl v. Bank of Casper, 718 P.2d 23, 28 (Wyo. 1986). In states in which the secured party's failure to comply with the Code is an absolute bar to a deficiency, courts have held that the secured party's failure to comply with the Code when foreclosing on its personal property collateral barred the secured party from subsequently foreclosing on its real property collateral. *See, e.g., In re* Boehne, 82 B.R. 525, 529 (Bankr. W.D. Mo. 1988) (applying Missouri law); United States v. Kennedy, 348 S.E.2d 636, 638 (Ga. 1986), *modified* Emmons v. Burkett, 353 S.E.2d 908, 911 (Ga. 1987) (adopting rebuttable presumption rule); State Bank of Towner v. Hansen, 302 N.W.2d 760, 767-68 (N.D. 1981).

[344] Courts in other states have held that when a secured party foreclosed on real property first and then foreclosed on personal property, but failed to comply

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with the Code, the secured party was barred from seeking a deficiency. *See* Bank of Dover v. Shipley, 773 S.W.2d 825, 826 (Ark. 1989); Cherry Manor, Inc. v. American Health Care, Inc., 797 S.W.2d 817, 822 (Mo. Ct. App. 1990). These cases are from states that follow the rule that the secured party's failure to give notice of sale to the debtor constitutes an absolute bar to any deficiency. *See supra* note 219 (reviewing absolute bar rule).

EQUITABLE DISTRIBUTION: IMPLEMENTING THE MARITAL PARTNERSHIP THEORY THROUGH THE DUAL CLASSIFICATION SYSTEM

Deborah H. Bell[*]

Mississippi divorce law has changed radically in the last twenty years. Grounds for divorce, basic assumptions about custody and parenting, and methods of property division and spousal support all reflect the dramatic alterations in family and gender roles in recent decades. In one of the most significant family law developments, the Mississippi Supreme Court in 1994 abolished the method historically used to divide property between divorcing couples. In its place, the court adopted the system now used in most of the country. The new system—equitable distribution—is based on a concept of marriage diametrically opposed to the theory underlying the old title system. The resulting divisions of property bear little resemblance to property divisions in Mississippi twenty years ago.

The difference in theory and the resulting division is obvious simply from a reading of *Ferguson v. Ferguson*,[1] the case that introduced the new marital property system, but adoption of equitable distribution will change much more than simply the results in individual cases. The critical step in implementing the marital partnership theory of equitable distribution—classification of separate and marital property—introduces into domestic practice a complex body of legal rules that will actually alter the nature of the practice. The title system, with its inherent flaws, did offer one advantage: while cases might be factually complex, the governing legal principles were relatively simple. In contrast, complexity has been the hallmark of equitable distribution law in all states. It will be particularly so in Mississippi for the next few years while the courts and legislature develop a comprehensive framework for property division under the new system. The new system comes much closer than the title method to recognizing expectations about property ownership in marriage and should significantly increase predictability in property division. However, complexity at the classification stage is inevitably one of the trade-offs.

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[1] 639 So. 2d 921 (Miss. 1994).

This article explores the impact of equitable distribution on the theory of marriage and the outcome of property division decisions and discusses the classification rules that implement the marital partnership theory. The article begins with a brief historical account of the two traditional marital property systems and the development of equitable distribution nationally and in Mississippi. The second half of the article examines issues that have provoked litigation under equitable distribution systems, discusses the extent to which the Mississippi Supreme Court has provided guidance on the issues, and suggests resolutions of specific issues.

I. TRADITIONAL MARITAL PROPERTY SYSTEMS

A. A Typical Fact Pattern

This article uses the facts of *Ferguson*, the case that introduced equitable distribution in Mississippi, to illustrate the resulting changes in marital property theory and operation. The Fergusons' circumstances are typical of cases that prompted development of equitable distribution across the country. Linda, forty-four years old, and Billy, forty-eight years old, separated and filed for divorce in May of 1991, after twenty-four years of marriage. Their children, Tamatha and Bubba, were twenty-three and fourteen.[2] Linda worked as a homemaker and cosmetologist, with a monthly salary of approximately $820.00. Billy was employed by Bell South, where he earned $3,000.00 a month. Billy held title to farm equipment, a partial interest in a cattle business, a partial interest in a mobile home park, and a leasehold interest in a farming operation. In connection with his employment, Bubba also held title to a savings plan, a stock ownership plan, and a vested pension. The couple jointly owned the marital home and thirty-three acres of land. Other than the jointly owned property, Linda's only asset was a 1988 Oldsmobile.[3] Linda asked for one-half of the listed property. Billy took the position that she was not entitled to any property titled in his name.[4] Until recent years, the outcome of this dispute would have depended upon whether Billy and Linda lived in one of the few community property states or were residents of a common law state. However, today, the outcome will not vary much from state to state. The next two sub-sections examine the two traditional marital property systems and the division of the Fergusons' assets under each.

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[2] *Ferguson*, 639 So. 2d at 929. The Fergusons also litigated custody of Bubba.

B. *The Title System of Marital Property*

Until the last half-century, courts divided property between divorcing spouses under either of two very different marital property systems. Prior to 1970,[5] the title system in effect in Mississippi and most states required that courts award property to the spouse who held title to the property during the marriage.[6] This title system viewed marriage as a

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Billy sought custody based upon Bubba's expressed desire to live with him. *Id.* Linda alleged that Billy let Bubba chew tobacco, ride a four-wheeler alone, carry a .357 magnum pistol, and promised him a truck. The court upheld the chancellor's award of custody to Linda. *Id.* at 932.

[3] *Id.* at 936. According to testimony of Billy's "paramour," Billy removed $30,000 from his savings plan and placed the money where it could not be found. *Id.* at 933.

[4] *Id.* at 933-34.

[5] J. THOMAS OLDHAM, DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY, § 3.01, at 3-2. *See generally*, Harriet S. Daggett, Division of Property Upon Dissolution of Marriage, 6 LAW & CONTEMP. PROB. 225 (1939).

[6] BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY, § 1.02, at 4 (2d

union of economically separate individuals, with each acquiring property for themselves, and not for the marital unit.[7] It was only after passage of the Married Women's Property Acts that women were even *permitted* to hold title to real property.[8] These Acts, however, only affected a woman's right to her separate property, acquired by gift or by her own efforts and titled in her name. The Acts did not create any property right in assets titled in her husband's name.[9] The strict rule against title transfer applied even if the wife was a wage-earner or worked in the husband's business. If the wife's salary went to disposable purchases while the husband's income was used to acquire assets, the title system awarded the assets to the husband nonetheless.[10] Not surprisingly, under this system the husband, as the primary wage-earner and title holder, usually left the marriage with most of the property.[11]

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ed. 1994); LESLIE HARRIS ET AL., FAMILY LAW, 329 (Little, Brown & Co. 1996).

[7] HARRIS ET AL., *supra* note 6, at 8. The authors caution that this description is overly simplistic, and that the title system was never as inflexible as current discussion indicates. *Id.* at 316.

[8] *Id.* at 12-13.

[9] The American title system grew out of the English common law of the eighteenth century, which viewed marriage as a merger of the husband and wife, with the husband holding legal title to all property of the marriage, including the wife's previously owned property. Under this system, no property division occurred upon divorce, since all property was owned by the husband. Subsequently, American states enacted women's property acts recognizing married women as persons under the law, with the right to hold title to property. Courts continued to apply the title system, but after the enactment of women's property acts, the system allowed married women to retain any property titled in their name, while their husbands retained property titled in theirs. TURNER, *supra* note 6, § 1.02, at 3.

[10] *See* Hinton v. Hinton, 179 So. 2d 846 (Miss. 1965). In Hinton, the wife requested an interest in farm property titled in the husband's name. Evidence showed that she had worked on the farm "as any other industrious farm wife would do," *id.* at 848, and had worked as a nurse and contributed her earnings to family expenses. *Id.* The court held that she was not entitled to an interest in the farm property. *Id.*; *see also* Murdoch v. Murdoch, 13 REP. FAM. L. 185 (Supreme Court of Canada 1974) (wife not entitled to share of ranch titled in husband's name even though she worked on ranch, including having primary responsibility during almost half of year), reprinted in HARRIS ET AL., *supra* note 6, at 14.

[11] Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 TEX. L. REV. 689, 695 n.47 (1990); AMERICAN LAW INSTITUTE, (ALI) PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Proposed

If, as was generally the case, the title system left a wife without sufficient property or earning potential to support herself after divorce, courts awarded her permanent alimony.[12] Alimony was awarded on the basis of need, without either much explanation of the procedure for determining the proper amount or much discussion of the theoretical basis for the award.[13] Although alimony now commonly takes several forms,[14] under the title system an ex-husband usually paid alimony in a set monthly amount for an indefinite period, until either he or his former wife died or the ex-wife remarried.[15] Awards of alimony under the title system were closely related to fault-based notions of divorce. Some courts apparently viewed alimony as a punishment meted out to the errant husband for leaving the marriage.[16] Similarly, a wife who was at fault in a divorce was generally not entitled to alimony.[17] In addition, alimony could be terminated or reduced

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Final Draft Part I, Feb. 14, 1997, at 1.

[12] OLDHAM, *supra* note 5, § 3.02[1], at 3-3.

[13] ALI, *supra* note 11, at 5.

> The result is that the meaning of "need"—the most fundamental issue created by such statutes—is hopelessly confused. Some opinions find an alimony claimant in "need" only if unable to provide for her basic necessities; others find need if the claimant is unable to support himself at a moderate middle-class level; and still others find need when the claimant is unable to sustain the living standard enjoyed during the marriage even if it was lavish. *Id.* at 5-6. The Institute proposes that alimony be re-characterized as compensation for loss, using the term "compensatory payment" rather than alimony or spousal support.

Id. § 5.01-5.05. *See also* Jean M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 262 (1989).

[14] Mississippi recognizes three types of alimony: (1) periodic alimony, sometimes called permanent or continuing alimony; (2) lump-sum alimony or alimony in gross; (3) rehabilitative alimony or periodic transitional alimony. Hubbard v. Hubbard, 656 So. 2d 124, 129 (Miss. 1995).

[15] OLDHAM, *supra* note 5, § 3.02[1], at 3-3.

[16] *Id.* at 3-3 to 3-5.

[17] In *Winfield v. Winfield*, 35 So. 2d 443, 444 (Miss. 1948), the Mississippi Supreme Court held that when divorce has been properly granted because of the adultery of the wife, she is not entitled either to alimony or to the custody of the children, save temporarily as to an infant so young as not to permit separation from its mother, and save in exceptional circumstances. In *Keyes v. Keyes*, 171 So. 2d 489, 490 (Miss. 1965), the Mississippi Supreme Court held that when a di-

based on the wife's "guilty" behavior after divorce.[18]

Under the title system, a chancellor hearing Linda and Billy Ferguson's divorce would apply a fairly simple process of property division. Linda would get the Oldsmobile, one-half the value of the marital home and one-half of the thirty-three acres. Everything else would go to Billy. Even though Linda worked as a homemaker without compensation and earned income used to support the family, she would leave the marriage with a small share of assets compared to Billy's estate. To supplement her income of $850.00 a month, the court would award her alimony[19] which could be difficult to collect. If Linda remarried, chose to live with another man, or, in some cases, chose to engage in a sexual relationship, she chanced losing her only financial return on the marriage. Furthermore, her financial security was forever linked to Billy. If he died, became disabled, or was unable to make payments for some legitimate reason, alimony would cease. Billy, on the other hand would leave the marriage with the great bulk of the assets and an obligation to pay alimony until Linda remarried.

C. Community Property Systems

Still in effect today, the second property system views marriage very differently. Rather than viewing a married couple as distinct individuals acquiring property for their own benefit, the community property system acknowledges a mar-

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vorce has been properly granted because of adultery of the wife, she is not entitled either to alimony or to the custody of children. This view was overruled in *Hammonds v. Hammonds*, 597 So. 2d 653, 655 (Miss. 1992), when the court held that where alimony is otherwise appropriate, it should not be denied a wife solely because she is adjudged at fault in the divorce judgment. Instead, marital fault should be but one factor for consideration. Consequently, adultery should not stand as an absolute bar to alimony, especially when denial of alimony would render the wife destitute.

[18] Hammonds v. Hammonds, 641 So. 2d 1211, 1215 (Miss. 1994) (allowing modification or termination of alimony for post-marital cohabitation).

[19] The chancellor held that Billy was at fault in the marriage, awarding Linda a divorce on the ground of adultery. Ferguson v. Ferguson, 639 So. 2d 921, 929-30 (Miss. 1974).

ried couple as an economic unit.[20] Under this system, derived from Spanish law,[21] all income earned by either spouse or property purchased with those earnings is marital property. Regardless of how title is held, each spouse owns one-half of all marital property.[22] Property acquired through gift or inheritance, or owned prior to the marriage, is the separate property of the individual owning spouse.[23] Thus, spouses equally own whatever their efforts during marriage produce, but keep separate ownership of property that does not result from their efforts.

The community property system governs ownership during the entire marriage, not just when divorce occurs. For example, the system affects creditor's rights with respect to marital property during the intact marriage and determines ownership when one spouse dies. If the couple divorces, assets are divided 50/50 regardless of whether the husband has been the sole wage-earner, and without regard to whether assets were titled in the husband's name. Because community property provides for equal division of assets, alimony is less significant, although still used, in most of these states.[24]

Linda and Billy Ferguson apparently did not have any assets that would be classified as separate under the community property system. All the couple's assets were acquired after the marriage, and none of their assets were the result of gift or inheritance. A divorce court in a community property state would divide the entire assets, regardless of title, equally between the two. Fifty percent of Billy's pension, stock ownership plan, savings plan, and farming, cattle, and mobile home park businesses would belong to Linda, in addition to her one-half of the jointly titled assets. Depending on the size of the estate, Linda also might be awarded alimony to supplement her income and the income from her share of the marital estate.

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[20] Eight states follow a community property regime, see ALI, *supra* note 11, at 2.

[21] William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q. 163, 164 (1989).

[22] TURNER, *supra* note 6, § 1.02, at 5.

[23] Reppy, *supra* note 21, at 165.

[24] ALI, *supra* note 11, at 2.

The two systems present completely opposing notions of the traditional wife's role in a marriage. While the community property system recognizes her as a full and equal partner in the marriage enterprise, with a corresponding financial stake, the title system completely ignored her contribution. The outcome, at least where the estate contained sufficient property to provide adequate support, was equally at odds. Under community property systems, a homemaker left the marriage with assets titled permanently in her name. However, in a titled state, her counterpart often left the marriage with no assets and financially dependent on her ex-husband. The inequities of the title system were the topic of discussion for many years, but it was the dramatic social changes surrounding marriage and divorce in the 1960's and 1970's that brought problems in the title system states to a crisis.

II. DEVELOPMENT OF EQUITABLE DISTRIBUTION

A. Erosion of the Title System

The section above illustrates how differently the community property and common law states treated spousal property rights. Today, the theory behind the community property system completely dominates property division in the common law states as well through a hybrid system that combines elements of both title and community property systems. Equitable distribution, the intermediate marital property system ultimately developed by common law states, did not sweep the country overnight. Instead, the transformation of marital property law occurred as a result of years of tentative changes, followed by a brief period of rapid and comprehensive changes.

By the middle of the twentieth century, critics attacked the title system as unfair to traditional homemakers.[25] They argued that the homemaker's valuable contribution to the marital unit was completely ignored by a system that awarded all property to the wage-earner.[26] The Mississippi Supreme Court voiced its criticism of the system in *Hemsley v. Hemsley*:

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[25] OLDHAM, *supra* note 5, § 3.02[2], at 3-4.

> Most parties enter into marriage with no estate and proceed to build an estate together. . . . If the breadwinner happens to be the husband and has all property in his name, this serves to relegate the non-breadwinner wife to the equivalent of a maid—and upon division of the marital estate entitled to a minimum wage credit for her homemaking service.[27]

Furthermore, critics dismissed alimony as an ineffective means of support. There was no guarantee of collection. Support was not available to a wife "at fault." Even if alimony was awarded, it was lost when the wife remarried. Furthermore, alimony was paid because the homemaker was deemed in need and not because she was seen as a contributing partner in the marriage.[28] Consequently, there seems to have been fairly wide agreement that the title system worked to the traditional wife's disadvantage.[29]

In response to these concerns, legislatures began to chip away at the title system, passing statutes that allowed divorce courts to award a wife assets to which she had made direct contributions.[30] At the same time, courts in some states developed judicial remedies to accomplish substantially the same result.[31] By the mid-1960's, a substantial number of states permitted distribution of assets between spouses without regard to title.[32] However, these statutes were generally very discretionary, and still retained the notion that the property

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[26] *See* Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977).

[27] 639 So. 2d 909, 915 (Miss. 1994).

[28] *See supra* notes 13-18 and accompanying text.

[29] OLDHAM, *supra* note 5, § 3.02[2], at 3-4.

[30] TURNER, *supra* note 6, at 6.

[31] *See id.* The doctrines of special equities and resulting and constructive trusts permitted the transfer of assets from a husband to a wife in unusual circumstances but not for ordinary homemaker services. *Id.* at 8-9.

[32] *Id.* at 6.

"belonged" to the husband. As a result, "the wife's property rights were clearly secondary to those of the husband."[33]

With the divorce revolution of the 1960's, the trend toward discretionary property division turned into a wholesale overhaul of marital property law. Brett Turner, one of the leading authorities on equitable distribution, suggests that the rising divorce rate of the 1960's accelerated the demise of title systems because the greater number of divorce cases made the system's flaws more noticeable. In addition, the loss of fault as a bargaining tool for wives in many states affected their ability to gain property division concessions not legally mandated. Finally, and most importantly, the changing role of women in society, with the expectation that women would be able to support themselves, undermined alimony as a marital dissolution equalizer and led to property division as an alternative.[34] These changes, combined with the existing perception that the title system disadvantaged homemakers, provided the catalyst for replacement of the title system. The solution of the title states was to develop a third marital property system, a hybrid between the title system and community property. Today, no state uses the title system for property division at divorce.[35] The following sections describe the theory and operation of the new system, and discuss its adoption in Mississippi.

B. *Theory of Equitable Distribution*

Equitable distribution is based upon the marital partnership theory adopted from community property law.[36] The marital partnership theory views marriage as a partnership in which both spouses contribute, financially or otherwise, to the growth of the partnership and the accumulation of assets.[37] Professor Joan Krauskopf identifies three assumptions underlying the theory. First, the theory is based on an assumption that "when two persons marry they make a commitment to the marital unit. . . . Each person will contribute all time and effort to the family welfare and will share the results of their commitment—good and bad, monetary and nonmonetary."[38] Second, the theory recognizes that homemaking enables the wage-earner to produce. Third, because homemaking enables earning, its value is proportional to the income produced.[39] Accordingly, the assets produced by the efforts of either spouse belong to the partnership, and each spouse has a right to a fair share of the partnership's assets.

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[33] *Id.* at 8.

[34] TURNER, *supra* note 6, at 10 n.38.

[35] The initial catalyst for the rapid changes was the Uniform Marriage and Divorce Act, which proposed two alternative marital property regimes—a community property system and an all property equitable distribution system. UNIF. MARRIAGE AND DIVORCE ACT § 307 (amended 1973), 9A U.L.A. 238-39 (1987). The UMDA was not widely adopted, but it sparked a national debate that resulted in the passage of equitable distribution statutes in almost all states. TURNER, *supra* note 6, § 1.02, at 14.

[36] Robert Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 148 (1989).

C. Operation of Equitable Distribution

Equitable distribution states have adopted different approaches for determining which assets are included in the divisible marital estate. In addition, those states approach division of the marital estate with different assumptions about the size of spousal shares. With respect to identifying the marital estate, a minority of states follow an all property (or "kitchen sink" or "hotchpot") equitable distribution system, in which courts may divide all property owned by either spouse.[40] No distinction is made between marital property and separate property such that property acquired before the marriage or by gift is subject to division, as well as that property acquired during the marriage.[41]

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[37] TURNER, *supra* note 6, at 16. Marital partnership theory "is mentioned in almost every case today." *Id.*

[38] Jean M. Krauskopf, *Classifying Marital and Separate Property — Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997, 997-98 (1987).

[39] *Id.*

[40] Reppy, *supra* note 21, at 166. Professor Levy notes that this system, also called a "hotchpot" system, has the advantage of reducing costly and time-consuming litigation, but does not necessarily comport with the expectations of divorcing spouses. *See* Levy, *supra* note 36, at 156 and n.42. A table listing all property equitable distribution states is set out in Joseph A. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L.Q. 193, 196 (1989).

However, a majority of states, use a dual classification system similar to that used in community property systems.[42] These states distinguish between marital property which is produced through efforts of the marital partnership, and separate property which is unrelated to marital partnership efforts. In most dual classification states, although marital property may be divided between the spouses without regard to title, separate property belongs to the owning spouse alone.[43] This approach is consistent with the theory of marital partnership. Professor Levy suggests that separate property exceptions reflect "essentially common-sense extrapolations of fairness notions and beliefs about spouses' expectations."[44] He believes that couples commonly perceive that income of either of them during the marriage is shared marital property, while assets owned prior to marriage, inherited or received as a gift are separate.[45] In dual classification states, identification of property as separate or marital is the first step in equitable distribution.

States also vary with regard to assumptions about how the marital estate is divided. Almost all states establish certain factors which control division. Factors commonly include contribution to the marital unit, need, and to some extent, marital fault.[46] However, some states adopt a presumption of equal division, which may be rebutted by a spouse claiming that fairness requires unequal division. Others states stop short of establishing a presumption but instruct divorce courts that equal division is a "starting point" for applying factors controlling division.[47] Finally, other states simply instruct divorce courts to apply specific factors to determine a fair and equitable division without any reference to equal division.[48]

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[41] McKnight, *supra* note 40, at 194.

[42] TURNER, *supra* note 6, at 44. Turner points out that the differences between the two systems are not as stark is often portrayed. Even in all property states, most courts divide separate property unequally. The result, therefore, is that the real difference is not between division of separate property and no division, but between unequal division of separate property and no division. *Id.*

[43] McKnight, *supra* note 40, at 193-94. McKnight also points out that a few states have created a hybrid system in which only marital property is subject to division unless special equities exists which require a division of separate estates. *Id.*, at 195.

[44] Levy, *supra* note 36, at 152.

[45] *Id.*

[46] Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279, 286 (1989). Marital fault is explicitly excluded as a factor in about one fourth of the states. HARRIS

After a court has identified and divided marital property between divorcing spouses, the court may consider whether alimony should be awarded to one spouse. Equitable distribution is intended, to the extent possible, to end the financial relationship between ex-spouses by providing each with an estate sufficient to begin a new and separate life. Thus, alimony awards are considered only after property division is complete.[49]

D. *Equitable Distribution in Mississippi*

The process of moving from the title system to equitable distribution in Mississippi fits the national pattern. Over the last twenty years, a series of decisions by the Supreme Court substantially eroded the title system.[50] As in other states, though, the transition was tentative and created a discretionary equitable remedy rather than a legal right. *Ferguson* established equitable distribution as a right, re-characterized the

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ET AL., *supra* note 6, at 342.

[47] TURNER, *supra* note 6, § 8.02, at 554-55. The starting point approach is analogized to a football game. The game starts with the ball on the 50 yard line. Unlike presumption states, where the ball "is stuck fast to the 50-yard line, and a certain minimum amount of force is needed to pull it loose and move it in either direction," the starting point allows the ball to "rest lightly on the 50-yard line, and it is not harder to move it off the 50-yard line than to move it off any other point." *Id.* at 556.

[48] Mississippi has adopted this approach. *See Ferguson*, 639 So. 2d at 927.

[49] *See id.* at 929 (stating goal of equitable distribution is to finalize division and conclude parties relationship).

[50] *See id.* at 925-26; *see also* Thomas W. Crockett & Walter P. Neeley, *Mississippi's New Equitable Distribution Rules: The Ferguson Guidelines and Valuation*, 15 MISS. C.L. REV. 415 (1995) (including good discussion of decisions marking shift from title system to equitable distribution).

marriage relationship as an economic unit of equal partners, and significantly altered the terms of marital dissolution in the state.

After a twenty-four year marriage, Linda and Billy Ferguson filed for divorce in 1991. Feeling wronged because the chancellor awarded Linda property titled in his name, Billy appealed the decision. The Mississippi Supreme Court announced the new system in the opening lines of the opinion: "This Court has been in a transitory state regarding the division of marital assets. . . . With this opinion, this Court adopts guidelines for application of the equitable distribution method of division of marital assets."[51] The court proceeded to discuss the potential unfairness of the title system, noting that in traditional households, the system failed to account for the nonfinancial contribution of housewives and, therefore, resulted in an unjust division.[52] The court justified judicial announcement of the change by reference to the chancery court's statutory authority to "make all orders touching the care, custody and maintenance of the children" and "touching the maintenance and alimony of the wife or husband or any allowance to be made to her or him."[53]

Sensing that the decision would be attacked as an adoption of community property rules, the court emphasized that it did not intend to create a community property regime. "[N]o right to property vests by virtue of the marriage relationship alone prior to entry of a judgment or decree granting equitable or other distribution. . . . Thus the rights of alienation and the laws of descent and distribution are not affected by our recognition of marital assets."[54] With regard to the assets available for distribution, the court adopted the majority dual classification system, distinguishing marital and separate property.[55] The court did not establish a presumption or starting point governing division. Instead, it emphasized that there is no right to an equal division, the proper distribution being within the chancellor's discretion.[56]

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[51] *Ferguson*, 639 So. 2d at 925.

[52] *Id.* at 926.

[53] *Id.* at 927 (quoting MISS. CODE ANN. § 93-5-23 (1972)).

[54] *Id.* at 928.

[55] *Id.* For a definition of marital assets, the court referred to its decision in *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994), decided the same day as

The court enumerated eight factors to be considered by a chancellor making an equitable distribution of property: (1) substantial contribution to property accumulation, including direct or indirect economic contribution, contribution to marital and family stability, and contribution to the education or training of the wage-earning spouse; (2) spousal use or disposition of assets and distribution by agreement; (3) market and emotional value of assets; (4) value of each spouse's separate estate; (5) tax consequences and legal consequences to third parties; (6) extent to which property division can eliminate the need for alimony; (7) needs of each spouse; (8) other factors which should be considered in equity.[57] In addition, the court specifically noted that it would require findings of fact by chancellors applying the eight factors governing division.[58]

The court in *Ferguson* outlined the steps to be followed when making an equitable distribution of property: A chancellor is to (1) classify assets as marital or separate; (2) value assets using expert testimony if necessary; (3) divide marital property equitably, based on factors set out in the decision; and (4) award alimony if needed.[59] In *Hemsley v. Hemsley*,[60] decided the same day, the court also adopted a presumption that property acquired during marriage is marital property, thereby, placing the burden of proof on the spouse claiming a separate property interest in a particular asset.[61]

The court in *Ferguson* remanded the case to the chancellor for review in light of the new guidelines set out in the opinion. Although the resulting division is not known, the opinion made

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Ferguson. In *Hemsley*, the court defined marital property as "any and all property acquired or accumulated during the marriage." *Hemsley*, 639 So. 2d at 915.

[56] *Ferguson*, 639 So. 2d at 927.

[57] *Id.* at 928.

[58] *Id.* at 929.

[59] *Id.*

[60] 639 So. 2d 909 (Miss. 1994).

[61] *Hemsley*, 639 So. 2d at 914.

it clear that everything titled in Billy's name would be considered marital property since all of it was acquired during the marriage.[62] It is also clear that the chancellor would have authority to award Linda one-half (or possibly more) of the marital estate.[63] And, although equal division is not required, an award of substantially less could be reversible, given the court's presumption of equal contribution. According to the dissent, this state of affairs is tantamount to adopting a community property system. However, as the next section illustrates, that is not the case.

E. Comparison to Community Property

Equitable distribution is similar to community property in that it recognizes a marital partnership to which each spouse contributes. Both systems operate in a remarkably similar manner at divorce. In fact, a slight majority of community property states have shifted from a 50/50 division at divorce to an equitable distribution of marital assets at divorce.[64] However, there are significant differences between the two systems. Community property is a complete system of marital property which governs spousal ownership of property during an intact marriage, upon divorce, and at death. In contrast, equitable distribution applies only at divorce.[65] The common law states which use equitable distribution have, in effect, chosen to use two marital property systems—equitable distribution at divorce, and the title system for all other purposes. This hybrid system may reflect the reformist impulse for adopting equitable distribution. Prompted by concerns about fairness, reformers borrowed the community property theory of marital partnership for the specific purpose of fixing the problems created by the title system at the time of divorce. Having fixed the problem of division at divorce, the states did not extend the theory to the intact marriage relationship.

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[62] *See supra* notes 2-4, 51-59 and accompanying text.

[63] *Ferguson*, 639 So. 2d at 927. At trial, the chancellor awarded Linda one-half of Billy's employment related assets and complete ownership of the marital home, debt free. Billy received full ownership of 33 acres, the tractors and trucks, the cattle business, the mobile home park interest, and the farm leasehold interest. *Id.* at 935.

[64] *See* Reppy, *supra* note 21, at 164.

[65] *See* OLDHAM, *supra* note 5, § 5.03[5], at 3-11. In community property states, the non-acquiring spouse has a vested right in the community property during the marriage. Consequently, the acquiring spouse's rights of management and transfer may be limited by the rights of the non-acquiring spouse. Conversely, in common law states, no rights in separate property vest prior to marriage, and the owning spouse's rights of management and transfer are generally unaffected by equitable distribution prior to divorce. *Id.*

The primary difference between community property and equitable distribution is illustrated by returning to Linda and Billy Ferguson. During their marriage, Billy's income was used to acquire and title assets in his name, while Linda's income was used for living expenses. In a community property state, Linda would have a vested one-half interest during the marriage in Billy's employment related assets as well as his businesses. Consequently, her creditors might be able to reach one-half of Billy's business assets.[66] In fact, Billy's ability to transfer and manage his business property would be affected by her interest.[67] If Billy died while still married to Linda, his estate would consist of only one-half of the assets titled in his name.[68] On the other hand, the result in a common law equitable distribution state would be exactly the opposite. Linda would have no vested interest in assets titled in Billy's name during the marriage. His ability to transfer, mortgage, and manage assets would be unaffected by equitable distribution.[69] If Billy died during the marriage, his estate would include all property titled in his name. Any interest claimed by Linda at his death would flow from the state's spousal share provisions applicable under the title system.[70] Therefore, in a common law state, Linda and Billy's property rights are governed generally by the title system. Only if they divorce will equitable distribution and the corresponding notion of marital property become operative.

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[66] *See generally*, TURNER, *supra* note 6, § 2.05, at 35-36. For this reason, attorneys are urged to use caution in applying community property principles to equitable distribution systems. For example, the rights of creditors during the marriage led community property states to adopt the inception of title rule for distinguishing marital and separate property. However, the reasons for the rule are not applicable in an equitable distribution system. *Id.*

[67] *See supra* notes 64-65 and accompanying text.

[68] *See* Reppy, *supra* note 21, at 164.

[69] *See generally*, OLDHAM, *supra* note 5, § 3.03[5], at 3-11.

[70] MISS. CODE ANN. § 91-5-25 (1972).

F. Implementing the System

The preceding section shows the complete reversal in twenty years of Mississippi's marital property system, of the view of marriage on which the system is based, and in the actual results in individual cases. The process of implementing the new system involves two primary steps: classification of assets as separate or marital and division of the marital assets. The division stage probably does not require significant alterations in the way divorce cases are prepared and tried. The factors—contribution, need, and fault—have been used as the basis for division for years. On the other hand, the classification process will introduce into domestic law practice a substantial body of new legal rules and corresponding practical issues. The following section examines these rules.

III. THE CLASSIFICATION SYSTEM—DIVIDING SEPARATE AND MARITAL PROPERTY

A. Definition and Exceptions

In dual classification states, a court begins property division by classifying assets as marital or separate property. Marital property is generally defined as all property acquired by either spouse subsequent to the marriage, with certain stated exceptions.[71] These separate property exceptions include assets acquired prior to marriage or traceable to premarital assets, assets acquired other than through marital partner efforts, such as gifts and inheritances, and assets designated as separate pursuant to agreement.[72]

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[71] *See* McKnight, *supra* note 40, at 201-03. The table at 202-03 catalogues statutes defining marital property and separate property and the exceptions to the marital estate. *Id.* at 202-03.

[72] Levy, *supra* note 36, at 152 (*quoting* C. FOOTE ET AL., CASES AND MATERI-

The classification process is critical to accomplish the purposes of equitable distribution. It has been suggested that the dual classification system probably acknowledges most divorcing spouses' expectations about what is marital and what is separate.[73] Without recognition of separate property, the notion that spousal property rights are based on marital efforts becomes meaningless. However, this recognition does, require a trade-off. The classification process provides a rich source of issues to litigate.[74] The following sections highlight the complexity of a dual classification system at this stage. Spouses have clashed over timing issues such as when an asset is acquired "during the marriage,"[75] whether joint gifts and interspousal gifts are separate property,[76] and how to deal with income from or appreciation of separate property.[77] Certain types of assets, such as professional degrees and goodwill, result in extensive litigation over whether they are "property" even capable of division.[78] Since property exchanged for separate property gets separate classification, lawyers have generated complex tracing rules to isolate separate property from marital property.[79] In fact, the closely related issue of trans-

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ALS ON FAMILY LAW, STATUTORY SUPPLEMENT 43-46 (3d ed. 1985)).

[73] *See supra* text accompanying note 44.

[74] Levy, *supra* note 36, at 152. Meeting the parties' expectations may come at the expense of other goals of an effective marital property system—efficient administration of divorce litigation and reduction of conflict between divorcing parties. Professor Levy, the original reporter for the Uniform Marriage and Divorce Act, lists the purposes of the Act as: (1) recognition that both spouses contribute to a family's wealth; (2) dissolution of marriage as efficiently and with as little conflict (both personal and legal) as possible; and (3) reduction of post-divorce contact. *Id.* at 148 and n.4. Professor Levy also notes that the separate property exceptions may be inconsistent with minimizing litigation. *Id.* at 152.

[75] *See infra* text accompanying notes 84-111.

[76] *See infra* text accompanying notes 112-31.

[77] *See infra* text accompanying notes 132-63.

[78] *See infra* text accompanying notes 230-51.

[79] Levy, *supra* note 36, at 156. Professor Levy states:

> [t]he grave difficulties associated with characterizing assets at dissolution may well account for the decision of the Commissioners on Uniform State Laws to adopt what has been called a "hotchpot" property scheme, that is, one that makes no distinctions between property based upon how a spouse may have acquired it. . . . [B]ut the price for that simpli-

mutation of separate property into marital is perhaps the most difficult and least understood classification issue.[80] Consequently, these issues can be time-consuming and costly to litigate.

For the next few years, lack of definition may exacerbate the inherent complexity of the classification system in Mississippi. In addition to the difficulties associated with classification in all states, Mississippi lawyers must predict classification results without a detailed statute for guidance and with only the beginnings of judicial resolution of important issues. In *Ferguson,* the court adopted the general scheme of dual classification, stating that separate property includes property acquired prior to the marriage, as well as inheritances and gifts acquired during or outside the marriage.[81] In *Hemsley v. Hemsley*,[82] the companion case to *Ferguson*, the court adopted a presumption in favor of marital property so that assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown that such assets are attributable to one of the parties' separate estate.[83] However, these decisions provide only the bare outline for classification. The following section discusses classification issues that commonly arise in dual classification states and the extent to which the Mississippi Supreme Court has addressed these issues.

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fication is to make the distribution issue that much more difficult.

Id. The policy decision is whether the high administrative costs of the dual system are justified in order to avoid the very discretionary all property scheme. *Id.*

[80] Levy, *supra* note 36, at 154 and accompanying text.

[81] *Ferguson*, 639 So. 2d at 928. *See* Ethridge v. Ethridge, 648 So. 2d 1143, 1143 (Miss. 1995) (holding no equitable division where all assets were owned by husband prior to marriage); Johnson v. Johnson, 650 So. 2d 1281, 1286 (Miss. 1994) (stating gifts and inheritances not subject to distribution).

[82] 639 So. 2d 909 (Miss. 1994).

[83] *Id.* at 914; *see also* Johnson v. Johnson, 650 So. 2d 1281, 1285 (Miss. 1994) (rejecting husband's contention that chancellor erred in dividing military pension based upon *Hemsley* presumption).

B. Timing Issues

1. Date on Which an Asset is Acquired

Since dual classification states limit marital assets to those "acquired during marriage," property acquired before or after the marriage is separate property not subject to distribution. One of the crucial issues in the classification phase is determining when a particular asset was "acquired." An obvious answer is that property is acquired when ownership is obtained—when legal title passes to the owning spouse. This approach works well when the acquiring spouse pays for the property in full at the time title passes. However, basing acquisition at title passage can produce inequitable results when payments are made over a period of time. For example, assume that John purchased a house in 1990, making a $20,000 down payment and taking title in his name. He borrowed the remaining $100,000 of the purchase price, giving First Bank a mortgage to secure the price. In 1992, John and Sarah married. Over the next five years, the couple made mortgage payments from an account containing John's salary. During this period, the outstanding balance of the mortgage was reduced by $40,000. In 1997, when John and Sarah divorced, the house was valued at $160,000. If "acquisition" occurs on passage of title, John acquired the house in 1990. The house would be his separate property and not subject to distribution, in spite of the fact that marital funds built most of the equity in the house.

In other states, equitable distribution courts struggling with this issue have looked without success to the rule used in community property states. For reasons peculiar to the community property system, passage of title termed "inception of title," is used in community property states to determine the date of acquisition,[84] although the harshness of the rule is softened by the use of equitable remedies.[85] Because the inception of title rule does not work for property purchased over time, courts in the common law states refused to follow the community property rule.[86] Instead, they created the "source of funds" rule, which uses payment as the test for acquisition.[87] Under this rule, an asset is acquired when payment is made and equity created in the asset. Because payment can take place over an extended period of time, including periods both during and outside of the marriage, the source of funds rule allows classification of an asset as "mixed," that is, part marital property and part separate property. Applying the source of funds rule to the example above, when John made a down payment of $20,000, he acquired a separate interest in the house. Similarly, when marital funds were used to reduce the principal balance by $40,000, John and Sarah acquired a marital interest.

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[84] TURNER, *supra* note 6, at 147. The fact that classification impacts the rights of creditors during the course of the marriage makes it important that assets be easily and permanently identified as separate or marital in community property states. *Id. See* OLDHAM, *supra* note 5, at 8-8.1.

[85] *See* OLDHAM, *supra* note 5, at 7-8.1 (stating inception of title "incorporates

Continuing the example, the house appreciated in value by $60,000 during the marriage. If the appreciation is passive, resulting from market forces and inflation rather than marital efforts —it is generally divided in the same ratio as the underlying interests. Since the marital home is one-third John's separate property and two-thirds marital property, $20,000 of the appreciation belongs to John and $40,000 is marital property subject to distribution. The house will be classified as a mixed asset, with $40,000 assigned to John as separate property and $80,000 available for division between John and Sarah. The remaining $40,000 in value is property that has not yet been "acquired" for the purposes of equitable distribution.[88]

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the concept of 'reimbursement'"). *See generally* Elizabeth B. Brandt, *The Treatment of Community Property Contributions to Mortgage Payments (Including Principal and Interest) on Separate Property*, 30 IDAHO L. REV. 697 (1994).

[86] *See* Frank G.W. v. Carol M.W., 457 A.2d 715, 717 (Del. Super. Ct. 1983) (holding trust assets and stock gifts as marital property subject to equitable distribution); Harper v. Harper, 448 A.2d 916, 918 (Md. 1982) (holding that source of funds rule satisfies Maryland's Act and that property is to be valued and then divided equitably between spouses).

[87] *See* Jackson v. Jackson, 765 S.W.2d 561, 573 (Ark. 1989); Thomas v. Thomas, 377 S.E.2d 666, 669 (Ga. 1989). The American Law Institute Principles adopts a pro-rata rule similar to the source of funds rule. *See* ALI, *supra* note 11, § 4.06 and cmt. b.

[88] TURNER, *supra* note 6, at 166-67. Turner notes that the formula should be

In *Arthur v. Arthur*,[89] the Mississippi Supreme Court implicitly recognized the source of funds rule as the test for determining when property is "acquired." In that case, the lower court awarded Peggy Arthur one-half of Jerry Arthur's pension profit sharing fund valued at $48,000.[90] The plan had accumulated funds since Jerry began working for Peoples Construction Company in 1969. Jerry argued on appeal that the chancellor should not have awarded Peggy a share of funds accumulated prior to the couple's 1978 marriage.[91] The court agreed and reversed for a determination of the amount of the funds accumulated prior to the marriage.[92] The decision necessarily recognizes that the fund is a marital asset only to the extent that funds were accumulated during the marriage, and therefore requires classification of the fund as a mixed asset, depending upon the source of funds used for acquisition. Although *Arthur* does not directly address how to divide appreciation of a mixed asset, the court states at the conclusion of the opinion, "[w]e therefore reverse. . . for a determination of what portion of the retirement fund, *and interest thereon*, was accumulated prior to the marriage."[93] This certainly appears to direct the chancellor to assign to Jerry's separate estate not only the separate funds originally deposited but also any appreciation of the separate funds.[94]

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adjusted, when necessary, to recognize premarital appreciation in value as separate property. *Id.* at 167. It is possible, of course, that appreciation of a mixed asset may be partly passive and partly active. In that case, the passive appreciation should be classified as mixed in the same ratio as the original value, while the active appreciation should be classified as marital. *See infra* text accompanying notes 136-39.

[89] 691 So. 2d 997 (Miss. 1997).

[90] *Arthur*, 691 So. 2d at 1000.

[91] *Id.* at 1003-04.

[92] *Id.* The retirement funds at issue were not "acquired or accumulated during the marriage" and were not subject to equitable distribution. *Id.*

[93] *Id.* at 1004 (emphasis added).

[94] Of course, the interest would be classified as passive rather than active and would, therefore, be separate.

2. *The Meaning of "During the Marriage"*

In addition to fixing the date or dates on which a particular asset was "acquired," courts must determine whether those dates were "within the marriage." Fixing the beginning date of marriage for purposes of this rule has proven easier than fixing the ending date, but both are subject to some variations.

The date on which a couple begins to accumulate marital property is almost always the date on which the parties were married.[95] However, some courts have varied the beginning date if the couple cohabited prior to the marriage. In that case, a minority of courts treat property acquired during cohabitation as marital.[96] Some courts have also treated property as marital if it was "in contemplation of marriage."[97] However, this exception is most frequently used to classify the marital home as marital property.[98] In fact, Turner suggests that courts have unnecessarily created the "contemplation" exception to deal with marital homes purchased partly before and partly during the marriage. This problem, he suggests, is appropriately dealt with by use of the source of funds rule to classify the home as a mixed asset rather than by manipulating the date on which marital acquisitions begin.[99] Other "contemplation" exception cases in which courts have found that the purchasing spouse intended to purchase the asset for the marriage are similar to the "transmutation by implied gift" cases and could be dealt with under that rule. The transmutation doctrine allows conversion of separate property into marital upon proof that the owning spouse acted in a way that reflects an intent that the property be marital.[100] It is difficult to imagine "contemplation" cases that would not be covered by the doctrine.

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[95] OLDHAM, *supra* note 5, at 6-31. *See* COLO. REV. STAT. § 14-10-113 (1997); MINN. STAT. ANN. § 518.54 (West 1990); MO. ANN. STAT. § 452.330 (West 1997).

[96] Cases classifying premarital acquisitions as marital property include *In re* Marriage of Dubnicay, 830 P.2d 608, 610 (Or. Ct. App. 1992) and *In re* Marriage of Burton, 758 P.2d 394, 395 (Or. Ct. App. 1988). The American Law Institute Principles of Family Dissolution provide for marital property classification for assets acquired during a period of cohabitation. ALI, *supra* note 11, at 4.03. However, a majority of courts have classified such property as separate. Crouch v. Crouch, 410 N.E.2d 580, 582 (Ill. App. Ct. 1980); Grishman v. Grishman, 407 A.2d 9, 11-12 (Me. 1979); McIver v. McIver, 374 S.E.2d 144, 149-51 (N.C. Ct. App. 1988).

[97] *See In re* Marriage of Altman, 530 P.2d 1012, 1013 (Colo. Ct. App. 1974); *In re* Marriage of Jacks, 558 N.E.2d 106, 108-09 (Ill. App. Ct. 1990); Stallings v. Stallings, 393 N.E.2d 1065, 1067 (Ill. App. Ct. 1979); Coney v. Coney, 503 A.2d 912, 917 (N.J. Super. Ct. Ch. Div. 1985); F.W.H. v. R.J.H., 666 S.W.2d 910, 912 (Mo. Ct. App. 1984). However, most courts have refused to alter the beginning date. *See* McIver v. McIver, 374 S.E.2d 144, 150 (N.C. Ct. App. 1988).

[98] ALI, *supra* note 11, cmt. d, at 99; *In re Marriage of Altman*, 530 P.2d at 1012; *In re Marriage of Jacks*, 558 N.E.2d at 108-09; Weiss v. Weiss, 543 A.2d 1062, 1065-66 (N.J. Super. Ct. App. Div. 1988); *F.W.H. v. R.J.H.*, 666 S.W.2d at 912; Raspa v. Raspa, 504 A.2d 683, 690-91 (N.J. Super. Ct. Ch. Div. 1985).

If property is marital because it was bought in contemplation of marriage, it can probably also be said that the owning spouse intended that the property be marital. The majority position, which does *not* classify property as marital based on cohabitation in contemplation of marriage, seems preferable. Adopting a fixed date—the marriage—provides a simple beginning point that will serve for most cases. Classification is already sufficiently complex without creating a flexible beginning date to resolve concerns adequately covered by other exceptions.

Not surprisingly, fixing the date on which a couple stops acquiring marital assets has proven more difficult. Cutoff dates established by courts and legislatures include the date of divorce,[101] the date of the divorce hearing,[102] the date on which the couple actually separated,[103] the date of a legal separation agreement or order,[104] the date of filing the divorce action,[105] and a date fixed in the court's discretion, based upon the facts in a particular case.[106] In the absence of a governing statute, the date of divorce appears to be used most often.[107]

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[99] TURNER, *supra* note 6, § 5.11, at 179. Turner points out that otherwise, a spouse's purchase of a home with separate funds prior to marriage, but in contemplation of marriage, becomes marital property. *Id.* Notably, the same home, purchased after marriage, but with separate funds, for use as the marital home would be separate property. *Id.*

[100] *See infra* text accompanying notes 206-08.

[101] *See In re* Marriage of Brooks, 486 N.E.2d 267, 271 (Ill. App. Ct. 1985); *In re* Marriage of Goforth, 459 N.E.2d 1374, 1381 (Ill. App. Ct. 1984); Taylor v. Taylor, 6736 S.W.2d 388, 391 (Mo. 1987).

[102] *See* OHIO REV. CODE ANN. § 3105.171(A)(2) (Anderson 1996); TENN. CODE ANN. § 36-4-121 (1996).

[103] *See* King v. King, 481 A.2d 913, 915 (Pa. Super. Ct. 1984); Price v. Price, 355 S.E.2d 905, 909 (Va. Ct. App. 1987); Waggoner v. Waggoner, 531 N.E.2d 1188, 1189 (Ind. Ct. App. 1988).

[104] *See* COLO. REV. STAT. § 14-10-113 (1997); KY. REV. STAT. ANN. § 403-

Fixing the date of divorce as the last date for classifying marital property has the advantage of certainty and simplicity. However, there is one consideration peculiar to Mississippi that may suggest a different rule. Unlike the vast majority of states, Mississippi does not permit unilateral, no-fault, or irreconcilable differences divorce.[108] If one spouse wants a divorce but has no grounds under the traditional fault-based statute, and if the other will not agree to an irreconcilable differences divorce, a long period of separation is often the result.[109] In some cas-

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190(2)(c) (Banks-Baldwin 1997).

[105] *See* Schanck v. Schanck, 717 P.2d 1, 3 (Alaska 1986); Ducharme v. Ducharme, 535 N.Y.S.2d 474, 476 (N.Y. App. Div. 1988).

[106] FLA. STAT. ANN. § 61.075(6) (West 1997).

[107] TURNER, *supra* note 6, at 185-86.

[108] Section 93-5-2 of the Mississippi Code permits divorce on the ground of irreconcilable differences, but only upon the joint complaint of the parties. Therefore, one party may not file unilaterally for an irreconcilable differences divorce, and no divorce may be granted on the grounds of irreconcilable differences where one party has contested or denied the issue, unless the contest has been withdrawn by leave of court. MISS. CODE ANN. § 93-5-2 (1994). In fact, the court has held that the requirements of an agreement are not met where each party files a separate petition requesting a divorce on the grounds of irreconcilable differences. *See* Massingill v. Massingill, 594 So. 2d 1173, 1177 (Miss. 1992). On the other hand, if the parties agree to an irreconcilable differences divorce but not to custody or property rights, the court may resolve the undecided issues if: (1) the parties consent in writing, personally signed; (2) the agreement states that the parties voluntarily consent to court resolution and that the court's decision will be a binding judgment; and (3) the agreement sets forth specifically the issues for decision. Consent may not be withdrawn without court approval once the court has begun any proceeding, including the hearing of a motion. MISS. CODE ANN. § 93-5-2(3).

[109] In the years prior to the addition of irreconcilable differences as a ground for divorce, divorces were often granted on the ground of cruelty in cases where the proof fell short of the definition. The test for cruelty was set out in 1930 as follows:

> [C]onduct only as endangers life, limb, or health, or creates a reasonable apprehension of danger thereto, thereby rendering the continuance of the marital relation unsafe for the unoffending spouse, or such unnatural and infamous conduct as would make the marital relation revolting to

es, classifying post-separation acquisitions as marital may be unfair if the marriage clearly is irretrievably broken and the parties have established separate households and finances. Moreover, long-separated spouses may be reluctant to acquire property, invest, develop new businesses, or expand existing operations if they know that all acquisitions may be claimed by their spouse as marital property.

To some extent this concern can be alleviated by an unequal award of post-separation marital property in the division stage. Applying the "contribution" factor,[110] the acquiring

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> the unoffending spouse and render it impossible for the [unoffending spouse] to discharge the duties thereof, thus defeating the whole purpose of that relation.

Russell v. Russell, 128 So. 270, 272 (Miss. 1930). For many years, cruelty was used almost as a means of gaining an irreconcilable differences divorce. For example, in *Wires v. Wires*, 297 So. 2d 900 (Miss. 1974), a husband was granted a divorce because his wife was jealous and accused him of philandering, would not let his daughter-in-law visit, and bickered so much that his son left home. In *Wires*, the court changed the standard of proof from clear and convincing evidence to a preponderance of the evidence. While the court noted that cruelty means more than unkindness or rudeness or mere incompatibility, it held that "habitual ill-founded accusations, threats, and malicious sarcasm, insults and verbal abuse" may cause such suffering as to destroy health. *Wires*, 297 So. 2d at 902.

Subsequently, the court announced a clear return to a more stringent standard. In *Marble v. Marble*, 457 So. 2d 1342 (Miss. 1984), the court denied a divorce to the husband even though it noted that "it is evident [the couple] can no longer live together." The court stated that the cruelty required is not such as merely to render the marriage undesirable or unpleasant, but impossible except at the risk to life and limb or health, must be real rather than imaginary, and must be clearly established by the proof. The proof showed that the parties had religious differences, and that the wife was not a good housekeeper and was not demonstrative. *Marble*, 457 So. 2d at 1343. In *Gallaspy v. Gallaspy*, 459 So. 2d 283 (Miss. 1984), decided after the addition of irreconcilable differences but before the statute was amended to permit disagreement on property and child issues, the wife sued for divorce based on cruelty because her husband criticized her for being overweight, prioritized work first, criticized her family, and failed to support or praise the children enough. The court recognized that courts had become liberal in application of this ground, but stated that "[i]f habitual cruel and inhuman treatment is to remain the seventh ground . . . the proof must sustain it. In this case, the proof was not sufficient." *Gallaspy*, 459 So. 2d at 285. Justice Robertson wrote a special concurrence arguing that there should be a thirteenth ground for divorce: irreconcilable differences—provable as any other ground, so that one spouse could prove that the marriage was irretrievably broken and thus obtain a divorce unilaterally. *Id.* at 287 (Robertson, J., specially concurring). *See also* Wilspouse could be awarded most, if not all, property acquired during separation, based on a finding that the other spouse did not contribute to their acquisition through income or homemaker services. Still, this approach is much less certain and leaves open the possibility that the court will divide post-separation assets based upon need or marital fault.[111] On the other hand, using the date of separation presents a different set of problems. It may be difficult to determine when a couple actually separated. The best solution may be to set a certain date prior to the date of divorce, such as the date of filing a petition for divorce.

C. *Separate Property: Gifts and Inheritances*

Mississippi is in line with most equitable distribution states in holding that gifts and inheritances are separate property not subject to equitable distribution. In *Hemsley v.*

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son v. Wilson, 547 So. 2d 803, 804-05 (Miss. 1989) (noting that couple genuinely hated each other and could not agree on time of day); Stennis v. Stennis, 464 So. 2d 1161, 1161 (Miss. 1985) showing husband slapped his wife, held her in hammerlock, and washed her mouth out with soap. In *Massingill v. Massingill*, 594 So. 2d 1173, 1177 (Miss. 1992) the court refused to permit a divorce to a couple on the ground of irreconcilable differences where both husband and wife sued for habitual cruel and inhuman treatment, and, in the alternative cited irreconcilable differences. The chancellor denied the divorce for either party on the grounds of cruelty, but granted an irreconcilable differences divorce because each had pleaded it as a ground. The Mississippi Supreme Court reversed, noting that the pleading also denied that the other was entitled to a divorce, and held that the statute must be strictly complied with and a written consent must be obtained in accord with the statutory requirements.

[110] *See supra* note 109 and accompanying text.

[111] In addition, one could argue that if one spouse has primary care of the children during the separation period, that spouse has contributed to the non-custodial parent's acquisition of property by freeing his/her time to engage in income-producing activities. *See In re* Marriage of Dubnicay, 830 P.2d 608, 612 (Or. Ct. App. 1992); *In re* Marriage of Burton, 758 P.2d 394, 395 (Or. Ct. App. 1988); Crouch v. Crouch, 410 N.E.2d 580, 582 (Ill. App. Ct. 1980); Grishman v. Grishman, 407 A.2d 9, 11-12 (Me. 1979); McIver v. McIver, 374 S.E.2d 144 (N.C. Ct. App. 1988).

Hemsley,[112] the court defined marital property as "any and all assets acquired during the marriage" unless it can be shown that the asset is "attributable to one of the parties' separate estates prior to the marriage or outside the marriage."[113] In *Ferguson*, the court listed as a factor for consideration in division "[t]he value of assets not ordinarily . . . subject to such distribution, such as property brought to the marriage by the parties and property *acquired by inheritance or inter vivos gift by or to an individual spouse*."[114]

Separate property treatment of gifts is consistent with the marital partnership theory underlying dual classification. Because a gift is not acquired as the result of effort by either of the marital partners, it is not a product of the partnership. Classification of gifts is less controversial than other issues discussed in this section; however, in the absence of a very specific statute, couples tend to argue over classification of interspousal gifts. In addition, third party gifts not clearly designated as individual may be subject to claims that a joint gift was intended.

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[112] 639 So. 2d 909 (Miss. 1994). *See In re* Marriage of Altman, 530 P.2d 1012, 1013 (Colo. Ct. App. 1974); *In re* Marriage of Jacks, 558 N.E.2d 106, 108-09 (Ill. App. Ct. 1990); Stallings v. Stallings, 393 N.E.2d 1065 (Ill. App. Ct. 1979); F.W.H. v. R.J.H., 666 S.W.2d 910, 912 (Mo. Ct. App. 1984); Coney v. Coney, 503 A.2d 912, 917 (N.J. Super. Ct. Ch. Div. 1985); McIver v. McIver, 374 S.E.2d 144, 146 (N.C. Ct. App. 1988).

[113] *Id.* at 914. *See In re* Marriage of Jacks, 558 N.E.2d 106; F.W.H. v. R.J.H., 666 S.W.2d 910 (Mo. Ct. App. 1984); Weiss v. Weiss, 543 A.2d 1062 (N.J. Super. Ct. App. Div. 1988); Raspa v. Raspa, 504 A.2d 683 (N.J. Super. Ct. Ch. Div. 1985).

[114] Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994) (emphasis added). The exception includes gifts and inheritances received outside or during the marriage. *Ferguson*, 639 So. 2d at 929. *See also* Blaser v. Blaser, 402 N.W.2d 875, 877 (Neb. 1987) (excluding inherited property as well as gifts from marital property subject to equitable distribution); Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988) (concluding that gifts and inheritance are generally awarded to donee or heir spouse).

1. *Joint Gifts*

It may be difficult to tell whether a particular third party gift was intended for one or both spouses. That determination is based on a fact question requiring analysis of several elements. However, the basic test for determining whether a gift is joint or individual is the donor's intent.[115] To make that determination, courts have looked to the following: statements of the donor,[116] statements of the spouses,[117] the tax treatment of the gift,[118] whether the gift was jointly titled,[119] the person to whom it was delivered,[120] and the relationship between the donor and the spouses.[121]

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[115] TURNER, *supra* note 6, at 204. *Cf. In re* Marriage of Cecil, 560 N.E.2d 374, 378 (Ill. App. Ct. 1990) (remanding case to determine husband's intent in placing non-marital assets into joint account).

[116] *See In re* Marriage of Eklund, 768 P.2d 340, 342 (Mont. 1989) (admitting evidence of donors' statements regarding their intent to make gift solely to husband even though letters were addressed to both spouses); Stainback v. Stainback, 396 S.E.2d 686, 689-90 (Va. Ct. App. 1990) (holding that donor's testimony sufficiently proved intent to make gift to donee alone).

[117] *See* Nolden v. Nolden, 448 N.W.2d 892, 894 (Minn. Ct. App. 1989) (holding $10,000 gift was nonmarital property based on recipient spouse's testimony that gift was given expressly to her); Maher v. Maher, 533 N.Y.S.2d 961, 962 (N.Y. App. Div. 1988) (holding $14,000 gift was nonmarital based on testimony of plaintiff's sister that their father intended gift only to plaintiff).

[118] *See* Portuondo v. Portuondo, 570 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1990) (analyzing tax treatment of gifts to determine if gift was made to one spouse or to both); Dotsko v. Dotsko, 583 A.2d 395, 400 (N.J. Super. Ct. App. Div. 1990) (analyzing tax consequences of gift to conclude donor did not intend to make gift to both spouses).

[119] *See* O'Neal v. O'Neal, 703 S.W.2d 535, 538 (Mo. Ct. App. 1985) (requiring clear and convincing evidence to prove conveyance by deed intended for one spouse only); Niles v. Niles, 550 N.Y.S.2d 208, 209 (N.Y. App. Div. 1990) (holding that conveyance to spouses as joint tenants was marital property); Osguthorpe v. Osguthorpe, 804 P.2d 530, 535-36 (Utah Ct. App. 1990) (concluding that checks made payable jointly to both spouses constituted marital property).

A jointly titled third party gift may be presumed to be a gift to both spouses. With regard to interspousal transfers, if one spouse jointly titles his or her separate property in both names, that spouse is presumed to have made a gift of 1/2 of the property to the other spouse. *See infra* text accompanying notes 181-91. Some states have extended this presumption to third party gifts. *See In re* Marriage of Hunter, 585 N.E.2d 1264, 1268 (Ill. App. Ct. 1992) (stating "the placing of title to nonmarital property in joint tenancy raises the presumption of a gift to the marital estate."); *cf.* Tubbs v. Tubbs, 755 S.W.2d 423, 424 (Mo. Ct. App. 1988) (holding that evidence presented was sufficient to overcome presumption that jointly titled gift was to both spouses). However, other states have rejected this presumption with regard to third party gifts. *See* Pope v. Pope, 587 A.2d 481, 485

If a joint gift was intended, almost all courts conclude that the gift is marital property subject to equitable distribution.[122] The alternative would be to treat the gifted property as the separate property of each spouse, with each owning exactly one-half. Treating joint gifts as marital property rather than separate property permits, but does not require, equal division. The *Ferguson* reference to gifts indicates that the Mississippi Supreme Court is in agreement with other jurisdictions that joint gifts are marital property since the court defines gifts "to an individual spouse as separate property."[123]

The Mississippi Supreme Court has not explicitly discussed the issue of joint gifts in an equitable distribution case, but in at least one case, joint gift analysis may have provided the

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(Md. 1991) (concluding that title of third party gift was not conclusive of donor's intent); Grant v. Zich, 477 A.2d 1163, 1171 (Md. 1984) (holding Maryland no longer recognizes presumption that property gift is to both spouses when property is titled as tenancy by entirety).

[120] *See* Vogel v. Vogel, 549 N.Y.S.2d 438, 440 (N.Y. App. Div. 1989) (stating conclusion of separate property was evidenced by gifts being delivered to husband individually instead of to spouses jointly).

[121] Gifts to a spouse from a parent or relative are more likely to be treated as separate. *See In re* Marriage of Martens, 406 N.W.2d 819, 822 (Iowa Ct. App. 1987) (stating that relationship between donor and donee should be considered when determining if gift is marital or separate property); *see also* Angel v. Angel, 562 S.W.2d 661, 664 (Ky. Ct. App. 1978) (holding that wife's receipt of her father's property was properly classified as nonmarital property). In the case of family heirlooms, it is even more likely that a gift will be treated as the separate property of the related spouse. *See* Elliott v. Elliott, 621 S.W.2d 305, 307-08 (Mo. Ct. App. 1981) (holding that family heirlooms and antiques acquired by wife from her parents were nonmarital property).

[122] *See, e.g., In re* Marriage of Vrban, 359 N.W.2d 420, 428 (Iowa 1984) (deeming as marital property money not inherited by or given only to one spouse); Calloway v. Calloway, 832 S.W.2d 890, 892-93 (Ky. Ct. App. 1992) (stating gift given to and enjoyed by both spouses jointly was marital property); Forsythe v. Forsythe, 558 S.W.2d 675, 679 (Mo. Ct. App. 1977) (holding gift acquired by spouses jointly was subject to division as marital property); Ackley v. Ackley, 472 N.Y.S.2d 804, 806 (N.Y. App. Div. 1984) (holding gift of property to both spouses which comes to them by reason of marital relation is marital property).

[123] *Ferguson*, 639 So. 2d at 928.

basis for the court's decision. In *Arthur v. Arthur*,[124] Peggy Arthur was awarded a one-half interest in cattle given to Jerry Arthur by Peggy's father. Apparently he did not argue that the cattle were a gift to him alone and, therefore, his separate property. Instead, Jerry argued that the cattle were not subject to distribution because Peggy had not contributed to their care or maintenance.[125] In response to his argument, the court held that Peggy's contribution need not have been a direct one thus upholding the chancellor's division.[126] With respect to classification of the cattle as marital, the Court stated, "It would be a fair assumption that but for Jerry's marriage to Peggy, Peggy's father likely would not have given Jerry cattle to get him started in the business in the first place. Furthermore, . . . the cattle were kept on Peggy's father's land."[127] Although the opinion does not discuss the issue, this statement could be interpreted as indicating that the cattle were a gift to the marriage and, therefore, were divisible marital property. Conversely, it is also possible that the quoted language was intended to refer to Peggy's contribution.

2. *Interspousal gifts*

When one spouse makes a gift to the other and there is no statutory provision explicitly addressing treatment of interspousal gifts, courts have taken varied approaches in classifying those gifts. Some courts have held that statutes excluding "gifts" from marital property, by the plain language of the statute, apply to interspousal gifts; therefore, they are separate property.[128] Some courts hold that property which began as marital property cannot be transformed into separate property by interspousal gift; therefore, such a gift is marital property.[129] A third approach, favored by commentators, is to look to the intent of the parties. Oldham suggests that interspousal gifts should be treated differently from other gifts, because "[f]ew parties believe they are waiving their rights in property when a 'gift' for the other is purchased. Most merely perceive the 'gifts' to be an expenditure of marital funds, particularly if the expenditure represents a significant portion of the marital estate."[130]

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[124] 691 So. 2d 997 (Miss. 1997).

[125] *Arthur*, 691 So. 2d at 1003. He did not argue that the cattle, which the court states were "given" to him by Peggy's father, were separate property.

[126] *Id.*

[127] *Id.*

[128] *But see* Holby v. Holby, 638 P.2d 1359, 1360 (Ariz. Ct. App. 1981) (holding gift by employer to wife was community property).

[129] *See* Semasek v. Semasek, 502 A.2d 109, 111 (Pa. 1985) (holding where

In *Ferguson*, the court noted in dicta that not all gifts may be separate property. "Chancellors will have to determine . . . whether an interspousal gift is a highly personal one or whether some type of property, i.e., stocks and bonds, may require something beyond a gift analysis."[131] This statement suggests that when classifying interspousal gifts, the court will look to the intent of the parties and that the nature of the gift is a significant factor in inferring intent.

D. Income From and Appreciation of Separate Property

The fact that a particular item was acquired as the separate property of one spouse does not automatically qualify the entire value of the asset for separate property treatment. For instance, if an asset appreciates in value during the marriage, a non-owning spouse may claim that the appreciated portion of the value is marital property, thereby requiring treatment of the item as a mixed asset. Similarly, income generated during the marriage from separate property may be claimed as marital property.

Interestingly, income and appreciation have been treated differently under dual classification systems, even though both

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language of statute makes no reference to interspousal gifts, "gifts" includes all gifts regardless of identity of donor); Powell v. Powell, 822 S.W.2d 181, 183 (Tex. App. 1991) (classifying wedding gifts from one spouse to another as separate property).

[130] OLDHAM, *supra* note 5, § 6.02[3], at 6-12. *Cf. In re* Marriage of Weinstein, 470 N.E.2d 551, 562 (Ill. App. Ct. 1984) (holding that insignificant value of interspousal gift as compared to total value of marital estate was not determinative factor in equitable distribution).

[131] *Ferguson*, 639 So. 2d at 929. (citing LaRue v. LaRue, 304 S.E.2d 312, 335-36 (W. Va. 1983) (Neely J., concurring)).

are products of separate property which differs only in the form in which the value is received.[132] Historically, income generated during marriage from separate property has been treated as all marital property[133] or, at the other extreme, all separate property.[134] In contrast, courts have tended to classify the appreciated value of separate property by examining the cause of appreciation.[135] However, the trend in recent years is to apply the approach used to classify appreciation to classify income, as well.

To classify appreciation, courts generally look to see what caused the asset to appreciate. If marital efforts, or "active appreciation," cause the increase in value, the appreciation is classified as marital property. On the other hand, if appreciation is caused by non-marital efforts, or "passive appreciation," it is classified as separate.[136] The active/passive distinction reflects the marital partnership theory of equitable distribution. Value that results from spousal efforts becomes property of the marital partnership, while value attributable to other sources does not. The rule, while true to the theoretical basis of spousal property rights, does create administrative problems. Questions arise regarding the amount of "spousal effort" necessary to trigger active appreciation. Parties have always argued over which spouse must provide the effort. Perhaps most troublesome, the appreciation itself may be mixed, partly passive, and partly active. Consequently, the active/passive rule necessitates a method or formula for determining the portion of appreciation attributable to spousal efforts and the portion that resulted from third party or market forces.

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[132] *See* TURNER, *supra* note 6, § 5.21, at 224.

[133] *See* Wenig, *Increase in Value of Separate Property During Marriage: Examination and Proposals*, 23 FAM. L.Q. 301, 304 (1989). *See* ALA. CODE § 30-2-51(a) (1989) (determining use for the common benefit); R.I. GEN. LAWS § 15-5-16.1(b) (1996) (stating income from property held prior to marriage, but not from inheritance or gift from third person, is marital property); TENN. CODE ANN. § 36-4121(b)(1)(B) (Supp. 1988) (classifying income as marital property if either party substantially contributes to property's preservation and appreciation).

[134] Wenig, *supra* note 133, at 304. *See* FLA. STAT. ANN. § 61.075(5)(b)(3) (West 1997) (stating nonmarital assets include all income derived from marital assets unless treated, used, or relied upon by parties as marital asset); N.C. GEN. STAT. § 50-20(b)(2) (1988) (stating separate property before marriage shall remain separate even if it increases in value).

[135] *See infra* notes 155-63 and accompanying text.

[136] TURNER, *supra* note 6, at 233 n.462. *See* FLA. STAT. ANN. § 61.075(5)(a)(2) (1995) (requiring enhancements in value from efforts of either spouse are considered active appreciation); KY. REV. STAT. ANN. § 403.190(2)(e) (Michie Supp. 1992) (stating not marital property if no effort by spouses enhances value); VA. CODE ANN. § 20-107.3(A)(3)(a) (Michie 1995) (stating active if efforts of spouses create substantial appreciation of separate property); *see* Brooks v. Brooks, 733 P.2d 1044, 1053 (Alaska 1987) (holding 32 units of rental property will only be considered active appreciation if it is necessary to "balance the equities"); Halpern v. Halpern, 352 S.E.2d 753, 753 (Ga. 1987) (concluding that appreciation in value of stock, which was a gift prior to marriage, is not marital property because the increase in value was due to passive appreciation); Wade v. Wade, 325 S.E. 2d 260, 268 (N.C. Ct. App. 1985) (holding building a house was improvements in real property which wife contributed so as to be classified as active appreciation).

1. *Spousal Efforts*

A few states require that the spousal effort causing appreciation be that of the non-owning spouse.[137] In a few other states, it appears that *both* spouses must contribute to appreciation to justify marital classification.[138] However, the majority of states, classify appreciation as marital if the efforts of either spouse produced the appreciation.[139] Notably, the two minority positions are not consistent with principles of equitable distribution. Equitable distribution classifies as marital any property produced by the efforts of either of the marital partners. If separate property has increased in value during the marriage because the owning spouse has spent time and energy to produce that value, then the increase is a product of marital efforts. Requiring efforts by the non-owning spouse or by both spouses ignores the marital partnership theory.

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[137] OLDHAM, *supra* note 5, at § 6.04[2], at 6-19 nn.8-8.1 & § 6.04[3], at 6-22 n.15. *See* S.C. CODE ANN. § 20-7-473(5) (stating appreciation is marital property only when increase was due to efforts of non-owning spouse); *see also* Lowdermilk v. Lowdermilk, 825 P.2d 874, 878 (Alaska 1992) (holding "time and energy . . . caring for the couple's child and keeping the family home . . . made some direct contribution" to separate property of car business); Nell v. Nell, 560 N.Y.S.2d 426, 426 (N.Y. App. Div. 1990) (holding work and creative talents contribute to appreciation in value); Robinson v. Robinson, 560 N.Y.S.2d 665, 667 (N.Y. App. Div. 1990) (finding fruits of wife's labor, time and effort may be said to have contributed to appreciation of value of husband's [separate] condo).

[138] OLDHAM, *supra* note 5, at 6-22 n.15.1. *See* Loyacono v. Loyacono, 618 So. 2d 896, 897 (La. Ct. App. 1993) (stating that uncompensated "common labor or industry" of spouses counts as spousal efforts in house repairs and mortgage payments); MacDonald v. MacDonald, 559 A.2d 780, 781 (Me. 1989) (holding efforts put in car dealership were "attributable to marital efforts"); Ford v. Ford, 766 P.2d 950, 952 (Okla. 1988) (stating the efforts need not be in form of monetary contribution or actual physical labor; rather, raising children counts as spousal effort in closely held corporations).

[139] *See* Watford v. Watford, 605 So. 2d 1313, 1314 (Fla. Dist. Ct. App. 1992) (finding family trucking business was marital property if either spouse had "expended material labor on that asset"); McNaughten v. McNaughten, 538 A.2d

In the minority of states that require efforts by the non-owning spouse, courts are further split as to whether the non-owning spouse's qualifying "efforts" include homemaking services.[140] Homemakers have claimed that their child-care and household services contribute to the appreciation of separate property by freeing the owning spouse to spend time not otherwise available to develop the separate property.[141] Because equitable distribution credits both financial and non-financial contributions,[142] a homemaker in this position should be viewed as having contributed to the separate property. However, the better view, which avoids this issue altogether, is simply to treat the appreciated value as any other asset and classify it as marital if either spouse has contributed to the appreciation process in any way.[143]

1193, 1197 (Md. Ct. Spec. App. 1988) (stating appreciation in corporate assets and stock were not part of marital property since wife was employee and stockholder like all other employees and stockholders); Hoffman v. Hoffman, 676 S.W.2d 817, 826 (Mo. 1984) (holding wife "made no substantial financial contributions" and her personal contributions were insufficient).

[140] *See, e.g.*, Goderwis v. Goderwis, 780 S.W.2d 39, 40 (Ky. 1989) (holding "joint efforts" may include contributions of one spouse who runs business and other spouse who is homemaker); *In re* Marriage of Herr, 705 S.W.2d 619, 623 (Mo. Ct. App. 1986) (stating performance of "usual spousal duties" was not substantial enough to classify as contributions to value of property); Schlachet v. Schlachet, 574 N.Y.S.2d 320, 321 (N.Y. App. Div. 1991) (holding plaintiff entitled to 50% of appreciation based on contributions as parent and homemaker).

[141] *Schlachet*, 574 N.Y.S.2d at 321. Schlachet, who was a psychologist, had a wife who took care of the couple's child at the expense of her own career as a social worker. *Id.* The court found that the wife contributed to the appreciation of her husband's practice. *Id.*

[142] *See Ferguson*, 639 So. 2d at 934.

[143] *See id.* at 929. If appreciation is classified as marital based upon the efforts of the owning spouse, the homemaker's efforts or lack thereof can then be con-

Commentators have questioned, and a few cases have discussed, whether there should be a requirement of substantial spousal contribution. Most cases are decided without reference to this issue[144] although a few have explicitly stated such a requirement.[145] Some commentators would dispense with a requirement of substantial contribution, addressing the problem of minimal contribution by classifying a minimal amount of appreciation as marital.[146] Others suggest that such a requirement of substantial effort would reduce spousal claims on separate property. Some minimal effort by the owning spouse can always be shown, since all property requires at least some management, such as bill paying, investment decisions, or minor repairs.[147] Litigation over marginal efforts could be eliminated by a substantial efforts requirement.

In *Carrow v. Carrow*,[148] the Mississippi Supreme Court used the majority "active /passive" approach to classify appreciation of a husband's separate property, notably, his Corvette collection. Jean Carrow divorced Jimmie Carrow after twenty-nine years of marriage. She requested an award of a one-half interest in Jimmie's collection of forty-six corvettes, valued at approximately $400,000.[149] The court found that some of the corvettes were purchased with Jimmie's inherited funds and were, therefore, separate property.[150] However, Jean argued that she fiberglassed and sanded the cars, and also enabled Jimmie to spend money and time on the corvettes by paying most of the couple's household expenses and performing domestic chores.[151] The court found that although Jean did some

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sidered as a factor at the division stage.

[144] *See* TURNER, *supra* note 6, § 5.22, at 244.

[145] *See* Schneidner v. Schneidner, 824 S.W.2d 942, 946 (Mo. Ct. App. 1992) (stating the efforts must be direct result of substantial contribution by effort, skill, or funds; performance of usual spousal duties is not enough); Haldemann v. Haldemann, 426 N.W.2d 107, 109 (Wis. Ct. App. 1988) (requiring effort by spouse that is unusual and beyond normal spousal duties).

[146] TURNER, *supra* note 6, § 5.22, at 244.

[147] OLDHAM, *supra* note 5, § 6.04[3], at 6-22.1.

[148] 642 So. 2d 901 (Miss. 1994).

[149] *Carrow*, 642 So. 2d at 905-06.

[150] *Id.* at 907.

[151] *Id.* at 906. Jean testified that she paid all bills for utilities, phone, grocer-

work on the cars, Jimmie did most of the work, and that "much of the value . . . came . . . from the work and improvements made upon them after they were purchased."[152]

The court in *Carrow* held that the appreciated value of separate property is divisible marital property "to the extent that the *non-titled spouse* had made a contribution toward that appreciation of value."[153] This statement aligns Mississippi with the minority of states that require contribution by the non-owning spouse in order to classify appreciation of separate property as marital. However, the Court then goes on to state that Jean "should be entitled to some portion of the couple's appreciated value of the separate property where the appreciation resulted from the *joined efforts*, skills or funds of both spouses."[154] This statement appears to adopt the other minority approach which requires efforts of both spouses. In light of this guidance, the case was remanded.

Carrow indicates that the Mississippi Supreme Court will follow the active/passive rule for classifying appreciation of separate property. However, it does not clearly indicate which spouse (or spouses) must contribute to the appreciation. As discussed above, the majority rule which permits active efforts of either spouse to create marital appreciation is more consistent with the purposes and theory of equitable distribution.

2. *Causation*

Once the chancellor determines that marital efforts have been expended on separate property, the court must decide what portion of the appreciated value is attributable to the marital efforts. Community property states have tended to take either of two different formula-based approaches to determining causation.[155] Conversely, equitable distribution states

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ies, household supplies, medical, car, insurance, maintenance, and clothing, and bought all household furnishings. She also performed all the housework, washing, grocery shopping, and cleaned the pool and hot tub. *Id.* at 905.

[152] *Id.* at 907.

[153] *Id.* (emphasis added).

[154] *Carrow*, 642 So. 2d at 897 (emphasis added).

[155] The community property approaches received their names from California

have generally eschewed formulas in favor of a fact-based approach. Courts look to market factors,[156] the expertise of the contributing spouse,[157] the nature of the property,[158] any contribution of funds,[159] and efforts by the non-owning spouse[160] to determine whether appreciation has resulted from passive forces or active marital contributions.

While the fact-based approach avoids the rigidity of the community property formulas, results tend to be unpredictable and the bases for decisions not well articulated. The American Law Institute's draft proposal on marital property measures appreciation using a formula similar to the *Pereira* formula used by community property states.[161] Section 4.05 of the pro-

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cases that illustrate the tests. The *Van Camp* test compensates the marital partnership for the reasonable value of the contributing spouse's labor, awarding the remainder of the appreciated value to the owner of the separate property. Van Camp v. Van Camp, 199 P. 885, 888-89 (Cal. 1921). The *Pereira* test takes the opposite approach, awarding to the owner of the separate property a reasonable rate of return on the capital and awarding all appreciation in excess of that amount to the marital estate. Pereira v. Pereira, 103 P. 488, 491 (Cal. 1909). Notably, Where appreciated value greatly exceeds a reasonable return and reasonable compensation combined, the two tests produce completely opposite results. *Van Camp* focuses on the separate nature of the underlying asset, while *Pereira* emphasizes the preference for marital property. For a discussion of community property states' use of the two formulas, see TURNER, *supra* note 6, § 5.22, at 246-47.

[156] *See* Knowles v. Knowles, 588 A.2d 315, 317 (Me. 1991) (holding marital contributions caused appreciation despite technical advances in video field).

[157] *See* Gilmore v. Gilmore, 287 P.2d 769, 774 (Cal. 1955) (discussing profits from capital investments not based on personal efforts or expertise of owner); Nardini v. Nardini, 414 N.W.2d 184, 194 n.9 (Minn. 1987) (holding personal efforts by spouse's expertise caused business to "flourish").

[158] *See Nardini*, 414 N.W.2d at 194 (holding that because small business grew with few tangible assets, active appreciation must have occurred); Brennan v. Brennan, 479 N.Y.S.2d 877, 881 (N.Y. App. Div. 1984) (stating "spousal efforts" counted as much as nature of property).

[159] *See* Marcum v. Marcum, 779 S.W.2d 209, 211 (Ky. 1989) (failing to prove gift from father equaled marital contribution so as to constitute active appreciation).

[160] *See* Rogers v. Rogers, 368 S.E.2d 412, 413 (N.C. Ct. App. 1988) (holding that without evidence of contribution there is no active appreciation); McClerin v. McClerin, 425 S.E.2d 476, 478 (S.C. Ct. App. 1992) (holding that increased value in stock in husband's company was caused by wife's direct and indirect contributions, including entertaining).

[161] The Reporter's comments indicate that allocating value increases among the

posed Principles of the Law of Family Dissolution provides,

> [a] portion of any increase in the value of separate property is marital property whenever either spouse has devoted substantial time during marriage to the property's management or preservation. . . . The portion of the increase in value that is marital property . . . is the difference between the actual amount by which the property has increased in value, and the amount by which capital of the same value would have increased over the same time period if invested in assets of relative safety requiring little management.[162]

Therefore, the proposed section follows the community property approach by awarding any surplus over a reasonable rate of return to the marital community. No particular index or rate of return is established by the proposed section, leaving the actual rate to be established by courts within the stated "relatively safe" guideline.[163]

E. Exchanges and Transmutations of Separate Property

The preceding section focused on changes in the value of separate property. This section focuses on two additional ways in which separate property changes. First, an asset may change form. When a separate asset is exchanged for other property, tracing rules are used to follow the separate interest through transfers. Second, the classification of property may change from separate to marital, through "transmutation."

1. Tracing Exchanges of Separate Property

In all dual classification states, property acquired in exchange for separate property remains separate property.[164] Exchanges may include sale of an item for cash, purchase of an

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separate and marital causes is "inherently arbitrary." ALI, *supra* note 11, at 128.

[162] *Id.* at 112.

[163] *Id.* at 114. The proposal notes that actual rates will vary with economic conditions and that there is no reason to require choice between Treasury bonds and mutual funds. *Id.*

[164] *See* J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 219 (1989).

item with cash, transfers of property for stock, stock splits, or any other direct exchange of items of roughly equal value.[165] In *Carrow v. Carrow*,[166] the Mississippi Supreme Court applied this basic equitable distribution principle, holding that Jimmie Carrow's corvettes were separate property because they were purchased with inherited funds.[167]

The exchange rule is deceptively simple to state; in practice it can be extremely difficult to apply.[168] Married couples do not neatly divide separate and marital property, but tend to commingle funds without specific designation of the nature and uses of the funds. Commingling separate and marital property does not, in itself, destroy the separate character of an asset.[169] However, property owned at divorce is presumed to be marital.[170] Because of this presumption, if an asset cannot be traced to separate funds or if the separate and marital portions cannot be identified, the entire asset will be treated as marital. Stated differently, commingling transmutes the separate property into marital property.[171]

In an effort to secure separate property status for assets, parties and their lawyers use tracing rules to prove that an asset purchased during marriage was actually acquired with separate property. Tracing separate funds in and out of bank accounts has generated considerable litigation and an assortment of doctrines to identify funds. The factual setting for a tracing dispute might look something like the following: Assume that during their twenty year marriage, John and Sarah collected oriental rugs, acquiring a collection of rugs valued at $160,000 on the date of divorce. John claims that the rugs are his separate property, because, he says, they were purchased primarily with funds inherited from his mother in 1985. Eighty thousand dollars of inherited funds were deposited into an account which also included deposits of $300,000 of John's salary. The only tangible assets traceable to the account are the rugs, which were purchased for $100,000. The account now contains $30,000. The remainder of the funds in the account were used for family and personal expenses. John claims that he used his salary to pay family and personal expenses and used the inheritance to buy the rugs; therefore, the rugs are primarily his separate property.

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[165] TURNER, *supra* note 6, § 5.23, at 257-58.

[166] 642 So. 2d 901 (Miss. 1994).

[167] For a full discussion of the *Carrow* case, *see supra* notes 148-54 and accompanying text.

[168] *See* TURNER, *supra* note 6, § 5.23, at 259. Oldham provides an example of a simple exchange of separate property and relative ease of tracing in such a case. "[A] spouse might have kept premarriage savings in a bank account, and used some money from this account to purchase an item during marriage. This purchase would thereby be traced to a separate property source, so the item would be deemed separate property." Oldham, *supra* note 164, at 220.

[169] TURNER, *supra* note 6, § 5.23, at 266 n.591.

[170] *See Ferguson*, 639 So. 2d at 933-34.

[171] Oldham, *supra* note 164, at 223-24. A few states that use a unitary system of property appear to have held that commingling automatically transmutes marital property into separate property. However, this transmutation is apparently because those jurisdictions do not permit an asset to be classified as mixed. Instead, each asset must be classified as completely separate or completely marital. TURNER, *supra* note 6, § 5.24, at 276.

Two separate assets must be classified through tracing—the remaining $30,000 in the account and the rugs. In such cases where parties deposited both separate and marital funds into an account and withdrew some of the funds, courts use a variety of rules to classify the funds withdrawn and funds remaining in the account. Some courts identify withdrawals as separate or marital property if withdrawn funds were clearly used in connection with separate or marital property.[172] Courts have also developed the "family expense" doctrine, which assumes that marital funds are used for family living expenses.[173] Other courts have assumed that separate funds are withdrawn first,[174] or, at the other extreme, assumed that marital funds are withdrawn first.[175] In other instances, courts have looked to the intent of the withdrawing spouse.[176] The "total recapitulation" method used by some courts examines family income and expenses over the term of the marriage. If expenses exceed or equal income, all remaining funds are deemed to be separate.[177]

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[172] Oldham, *supra* note 164, at 224. If funds are used to maintain separate property, those funds are assumed to be separate funds. Likewise, if funds are used to maintain marital property, then funds are assumed to be marital funds. *Id.*

[173] *See* Beam v. Bank of America, 490 P.2d 257, 263 (Cal. 1971) (using "family expense" presumption in holding that no part of estate could be considered community property).

[174] Oldham, *supra* note 164, at 225.

[175] *Id. See* Allen v. Allen, 584 S.W.2d 599, 600 (Ky. Ct. App. 1979) (holding

A comprehensive examination of these tracing doctrines is beyond the scope of this article. However, by way of example, a court in the hypothetical case might find the family expense doctrine appropriate.[178] Applying that doctrine, of the $380,000 deposited in the account, the $250,000 spent on family expenses were marital funds in the form of John's salary. Of the remaining $130,000, $80,000 was separate property of John and $50,000 was marital property. $100,000 was used to purchase rugs. The other $30,000 constitutes the balance of the account.

The family expense doctrine only resolves a part of the

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that original deposit of nonmarital cash into savings account by husband, followed by deposits and withdrawals of money for marital purposes, was separate because balance never fell below level of original deposit); Harris v. Ventura, 582 S.W.2d 853, 855-56 (Tex. App. 1979) (finding presumption that where checking account contained both community and separate property, community funds were presumed to be withdrawn first); *see also* Chenault v. Chenault, 799 S.W.2d 575, 581 (Ky. 1990) (Vance, J., concurring) (stating presumption that separate property which commingles with marital property remains separate if total balance remains above amount of separate property).

[176] *See* Wadlow v. Wadlow, 491 A.2d 757, 762 (N.J. Super. Ct. App. Div. 1985) (holding that there existed unequivocal intent that commingled funds belonged to wife and would ultimately be returned to her).

[177] Oldham, *supra* note 164, at 227. *See* Houska v. Houska, 512 P.2d 1317, 1320 (Idaho 1973) (remanding case to inquire as to net income and expenses of community); Evans v. Evans, 453 P.2d 560, 568 (Idaho 1969) (stating that "rents and profits of a husband's separate property are community property only to the extent that they are not rents and profits") (citing Malone v. Malone, 130 P.2d 674 (Idaho 1942)).

[178] *See generally supra* text accompanying notes 171-75 (pointing out that courts use several different approaches to determine appropriate tracing rules). The first rule would not be applicable because none of the withdrawals were related to separate or marital property. The recapitulation rule would be an alternative, and might produce the same result as the family expense doctrine. The family expense doctrine seems more appropriate in this case than the arbitrary assumptions about first withdrawals, which should be useful primarily when there is no logical reason for classifying withdrawals. *Id.*

problem. It does not tell us how much of the $80,000 was used to purchase rugs. Clearly, at least $50,000 was applied to the purchases. If the court assumes that marital funds are paid out first then the rugs were purchased with $50,000 marital property and $50,000 of John's separate property. Therefore, the remaining $30,000 is John's separate property. At this point, the court would apply the source of funds rule to apportion the original value of the rugs. It would divide the $60,000 passive appreciation in the same ratio.[179] The rugs will be fifty percent John's separate property and fifty percent marital property subject to equitable distribution. On the other hand, if the court assumes that separate funds are withdrawn first, the rugs were purchased with $80,000 of John's separate property and $20,000 of marital funds. The remaining $30,000 is marital funds and the rugs are four-fifths John's separate property and one-fifth marital property.

Application of different tracing rules to identify even a portion of the funds can produce strikingly different results. In the example above, John would have separate property of $110,000 or separate property of $128,000, depending on the tracing rules used to identify a portion of the account. This example, which involves relatively simple facts, illustrates the potential complexity of tracing disputes. In many cases, because of the length of time involved and the number of transactions, it is either not possible or not time and cost efficient to trace funds to a separate source. A spouse may deliberately choose to forego a separate property claim if one-half the value of the disputed item does not warrant the effort and expense. In that case, the commingled separate funds would be considered transmuted into marital property.[180]

The Mississippi Supreme Court has clearly recognized the rule that property exchanged for separate property remains separate. It has not, however, had the opportunity to develop rules for tracing commingled funds. As the discussion below illustrates, the court has discussed the effect of commingling in some transmutation cases that contain unfortunately broad language. Some statements by the court suggest that *any* commingling transmutes separate property into marital, even if tracing is possible. Such a position would place Mississippi in a very small minority.

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[179] *See supra* text accompanying notes 89-94.

[180] *See supra* text accompanying notes 169-71.

2. Transmutation of Separate Property into Marital

Under certain circumstances, a separate asset may be converted to a marital asset by "transmutation." One method of transmutation—through commingling which prevents tracing—was illustrated in the preceding section. Transmutation may also occur when a spouse transfers separately titled property into joint title, or when, even without joint titling, a court infers that the owning spouse intended to make a gift of property to the marital estate.

a. Transmutation by Joint Title

Common law states have long applied a presumption that whenever an owning spouse retitles his or her property jointly with a spouse a gift is intended.[181] Thus, upon divorce or death each spouse is deemed to be a one-half owner of the jointly-titled property.[182] The presumption, as applied in equitable distribution, results in a finding that the owning spouse made a gift to the marital estate.[183] Rather than each spouse owning an absolute one-half, the gifted property is marital and may be divided unequally.[184] However, this presumption can be rebutted by the owning spouse by a showing that no gift was intended.[185]

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[181] *See* Lewis v. Lewis, 785 P.2d 550, 555 (Alaska 1990) (holding 100,000 shares of Petro stock purchased with cash from a premarital asset to be marital property because the shares were held jointly by husband and wife); Lofton v. Lofton, 745 S.W. 635, 639 (Ark. App. 1988) (holding two certificates of deposit purchased with husband's inheritance and marital property and titled in both his and his wife's names to be owned by tenancy by entirety, minus clear and convincing evidence to the contrary); Robertson v. Robertson, 593 So. 2d 491, 494 (Fla. 1991) (holding house bought by husband with his separate money became marital property, when title indicated tenancy by entirety, unless purchasing spouse can show no gift was intended); Amato v. Amato, 596 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1992) (holding $70,000 proceeds from insurance payment to wife, placed into joint bank account and used by both wife and husband, created presumption that wife made gift to husband of one half interest in the proceeds).

[182] Oldham, *supra* note 164, at 236.

[183] TURNER, *supra* note 6, § 5.18, at 209.

The Mississippi Supreme Court applied the joint title presumption in an equitable distribution setting in *Sarver v. Sarver*.[186] Roy Sarver met Marie when he was sixty-five and retired. After their marriage, Roy used funds from the sale of a California home that he owned prior to the marriage to purchase seventy-eight acres titled in his name. When Roy developed serious heart trouble, Marie allegedly convinced him that, "if he were to die without putting the property in their names jointly, the property would be tied up in probate for years."[187] Roy followed her advice, and titled the property in both their names.[188] Marie argued upon divorce that she was entitled to a one-half interest in the property, based on the presumption of a gift created by the joint titling.[189] The court found that Roy had produced clear and convincing evidence that he did not intend to make the home a gift to Marie, but rather meant to convey a life estate to her, and that he wanted the property to go to his children in fee simple. Because the funds used to purchase and construct the home were earned prior to the marriage, the house was not marital property.[190] *Sarver* signals that the court will apply the joint title presumption in the equitable distribution context, and that it will look to the grantor's intent to provide a beneficial interest rather than whether the owner simply intended to transfer legal title.[191]

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[184] *See* Farmer v. Farmer, 398 So. 2d 723, 726 (Ala. Civ. App. 1981) (finding that wife's $17,000 contribution to purchase price of house was contribution to marital estate, division of which was subject to discretion of court, not part of her separate estate); Lynam v. Gallagher, 526 A.2d 878, 884 (Del. 1987) (holding that husband's transfer of stock to wife as joint tenants created rebuttable presumption that he intended it as gift of marital property to be divided according to the court's discretion); Carter v. Carter, 419 A.2d 1018, 1022 (Me. 1980) (holding real property transferred from husband to him and his wife as joint tenants was marital property).

[185] *See* Oldham, *supra* note 164, at 238-39. There is some division among the states as to the proof necessary to rebut the presumption. For example, some states hold that an intentional transfer of legal title for estate planning purposes is a gift, while others hold that it is not. *See* Oldham, *supra* note 164, at 238. Turner calls the two approaches the "legal interest rule" ("defines donative intent as the intent to convey legal title without consideration") and the "beneficial interest rule" when the question is whether "the donor intended to give the donee a real beneficial interest in the property." TURNER, *supra* note 6, § 5.18, at 212-14.

[186] 687 So. 2d 749 (Miss. 1997).

[187] *Sarver*, 687 So. 2d at 752. Marie apparently promised that she would ensure that the land went to his children as he wished. *Id.*

[188] *Id.*

[189] *Id.* at 754.

b. Transmutation through commingling

When marital and separate assets are mixed together in such a way that marital and separate interests cannot be identified and traced, then the separate property is said to have transmuted into marital property by commingling. This process results from an inability to trace the interests, combined with the presumption in favor of marital property,[192] not simply because there has been commingling. The Mississippi Supreme Court has discussed transmutation through commingling in several cases without clearly delineating when transmutation occurs.

In *Johnson v. Johnson*,[193] a dispute arose involving Jane Johnson's separate property inherited from her parents. The property included timber land worth $98,000 and marketable timber worth $95,000. Timber sale proceeds of $153,000 were used during the marriage to pay family expenses, to purchase a van in her husband Wayne's name, and to add to Wayne's savings account.[194] The court noted that Wayne had returned $66,000 of the separate property to Jane. According to the

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[190] *Id.*

[191] *Id.* at 754-55. The opinion is somewhat more complicated than the textual discussion indicates. It is clear that all of the funds used to build the house were Roy's separate property. However, the home was constructed during the marriage, primarily through Roy's labor, but with some assistance by Marie. Thus, some of the value of the home was marital property. The lower court awarded Marie a $16,000 lien on the property as compensation for her contributions to the home, and the Mississippi Supreme Court upheld the award of a lien. *Id.* at 756

[192] *See* Kemp v. Kemp, 485 N.E.2d 663, 668 (Ind. Ct. App. 1985).

[193] 650 So. 2d 1281 (Miss. 1994).

[194] *Johnson*, 650 So. 2d at 1284-85.

Court, "that portion of those assets which were commingled with the joint marital estate, i.e., timber sales, for the use of the family had, at the time of trial, lost their nonmarital character by commingling . . . Any assets inherited by Jane but not commingled retained their non-marital character."[195] Although not spelled out in the decision, it appears that Wayne returned to Jane the funds still remaining in his savings accounts and that all the remaining funds had been spent. Based on those facts, the result is clearly correct. However, the court's statements regarding commingling and transmutation are much broader. The court stated that assets which were commingled lost their separate character because of the commingling, while only those assets not commingled remained separate. Unless read in the context of the specific facts of the *Johnson* case, the wording appears to remove the possibility of using tracing rules to identify commingled separate property.

In *Heigle v. Heigle*,[196] the Court considered the claim of JoAnn Heigle to $10,000 inherited from her mother during the marriage. The funds were used to purchase cattle and for other family expenses. After JoAnn and her husband Roger separated, the remaining cattle were sold and JoAnn received the proceeds of $4000.[197] The court overruled the chancellor's order that Roger pay JoAnn $6000. "[N]on-marital assets (e.g. inherited property) may be converted to marital assets if they are commingled with marital assets or used for familial purposes. Such converted assets are then subject to equitable distribution."[198] The court found that by placing the funds in an account used to purchase cattle and pay other family expenses, the inherited funds lost their status as nonmarital property. However, the $4000 which Roger paid JoAnn regained its nonmarital status.[199] As with *Johnson*, the *Heigle* decision reaches what is clearly the correct result—the inherited funds were expended and nonexistent, with the exception of $4000, which remained separate. Again, however, the Court's language is broader than the facts and could be read to create a rule that any commingling transmutes separate property into marital, even if funds remain and can be traced.

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[195] *Id.* at 1286 (citations omitted). The court also noted that the $66,000 returned by Wayne to Jane regained its separate character. *Id.*

[196] 654 So. 2d 895 (Miss. 1995).

[197] *Heigle*, 654 So. 2d at 897.

[198] *Id.*

[199] *Id.* at 897-98.

In *Maslowski v. Maslowski*,[200] the court again stated, "[c]ommingled property is a combination of marital and non-marital property which loses its status as non-marital as a result."[201] The facts of the case and the court's disposition are confusing. The land on which the couple built the house was jointly titled and was a gift from Kenneth Maslowski's mother. Kenneth contributed approximately $12,000 to $13,000 of separate funds to the construction of the house.[202] Sandra's father provided most of the labor on the house, and both spouses worked on the construction. Kenneth paid the house note every month after the couple separated and claimed a separate property interest for that amount.[203] The court stated that the parties had commingled non-marital and marital contributions into "a mixed asset."[204] Because the amounts of marital and nonmarital contributions were not clear, the case was remanded.[205]

c. Transmutation by Implied Gift

Transmutation by implied gift is deemed to occur when an owning spouse, by actions or statements or both, indicates an intention to make a gift of separate property to the marital estate. In making such a fact-based determination, courts have looked to statements,[206] the manner in which the property was used during the marriage[207] and the extent to which the property was commingled with marital funds.[208]

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[200] 655 So. 2d 18 (Miss. 1995).

[201] *Maslowski*, 655 So. 2d at 20.

[202] *Id.* at 22. These funds were from the sale of a boat and real property and from accounts owned prior to the marriage. *Id.*

[203] *Id.*

[204] *Id.* at 23.

[205] *Id.*

[206] *In re* Nicks, 531 N.E.2d 1069, 1072 (Ill. 1988) (noting statement by husband that he put title in joint tenancy because his wife said she had never owned anything and because "she wanted to be proud of something she owned"); McCulloch v. McCulloch, 435 N.W.2d 564, 568 (Minn. Ct. App. 1989) (determining

IV. SPECIFIC PROPERTY

The initial question with respect to a particular asset is usually whether the asset is separate or marital based upon the principles set out in the preceding section. However, there are several forms of property that parties have claimed are not even "property" subject to distribution at all, with varying results among the states. These include pensions and other employment-related benefits, personal injury awards and similar disability awards, and professional licenses, degrees, and goodwill. This section discusses treatment of these three forms of property under dual classification systems.

A. *Pensions*

In Mississippi, as in the majority of states, vested retirement benefits constitute property for the purposes of equitable distribution.[209] In the early years of equitable distribution,

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homestead property originating as nonmarital interest of husband was found to be marital property upon statement of husband that "[s]he would own the house equally with [himself,]" because statement created donative intent) (alteration in original); Westbrook v. Westbrook, 364 S.E.2d 523, 527 (Va. 1988) (considering statement by owning spouse that, "I agree we own the house together," and "It's my understanding that in Virginia, you know, that's marital property").

[207] *See* Burgess v. Burgess, 710 P.2d 417, 420-21 (Alaska 1985) (holding that premarital property used as marital residence with both parties participating in upkeep and maintenance of property created marital interest in accumulated equity in property); *In re* Marriage of Tatham, 527 N.E.2d 1351, 1361 (Ill. 1988) (stating sailboat given to husband prior to marriage considered marital property because it was intended for use and enjoyment of family); Boyce v. Boyce, 694 S.W.2d 288, 290 (Mo. Ct. App. 1985) (stating Ford mustang owned by husband prior to marriage was considered marital property upon evidence that his wife drove it every day after their marriage).

[208] TURNER, *supra* note 6, § 5.24, at 283. Note that the use of commingling as a factor for determining whether an implied gift has occurred is not the same as transmutation by commingling. In the latter, transmutation occurs because property has been so commingled that distinguishing between the separate and marital components is not possible. However, with transmutation by implied gift, tracing may be possible, but the commingling is significant factor indicating intent. *Id.*

[209] Savelle v. Savelle, 650 So. 2d 476, 478 (Miss. 1995) (stating that retirement

some courts held that pension benefits were not divisible property, even if the pension was acquired during the marriage. However, there is now widespread agreement that pensions constitute divisible property.[210] The difficult issues with respect to pensions today are determining separate and marital portions of the pension and treatment of unvested pensions.

Even prior to official adoption of equitable distribution in *Ferguson*, the Mississippi Supreme Court considered vested pensions divisible at divorce. In *Brown v. Brown*,[211] the Court held that a spouse's pension is personal property subject to division.[212] However, the court emphasized in subsequent decisions that the non-owning spouse does not have a vested right in the pension during the marriage, or an automatic right to 50% of the pension upon divorce.[213] If the pension was acquired during the marriage so as to constitute marital property, it is subject to distribution based upon the factors set out in *Ferguson*.[214]

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benefits constitute personal property); *see* Pierce v. Pierce, 648 So. 2d 523, 525 (Miss. 1994) (same); *see also In re* Marriage of Grubb, 745 P.2d 661, 665 (Colo. 1987) (same); Diffenderfer v. Diffenderfer, 491 So. 2d 265, 266-67 (Fla. 1986) (same); Jones v. Jones, 680 S.W.2d 921, 921-22 (Ky. 1984) (same); Draper v. Draper, 627 So. 2d 302, 305-06 (Miss. 1993) (same); Kuchta v. Kuchta, 636 S.W.2d 663, 666 (Mo. 1982) (same).

[210] *See* TURNER, *supra* note 6, § 6.09, at 327-330. Some parties have argued that pensions are not present, divisible property because pensions are future benefits which are not transferrable. *Id.* at 327-28.

[211] 574 So. 2d 688 (Miss. 1990).

[212] Brown, 574 So. 2d at 691.

[213] *Id.*; *see* Savelle v. Savelle, 650 So. 2d 476, 479 (Miss. 1995) (stating that automatic fifty-fifty split not required); Pierce v, Pierce, 648 So. 2d 523, 526 (Miss. 1994) (holding no automatic right to fifty-fifty division of pension); Parker v. Parker, 641 So. 2d 1133, 1139 (Miss. 1994) (holding right vests only after chancellor makes equitable division).

[214] *See* Ferguson v. Ferguson, 639 So. 2d 921, 934 (Miss. 1994) (stating pension was divisible as marital asset because accumulated by joint contributions during 24 year marriage). Military pensions and benefits are governed both by state and by federal law. Prior to 1982, military retirement benefits were not divisible at divorce. In 1982, Congress enacted the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408, which overruled a prior United States Supreme Court decision holding that military retirement benefits were not divisible upon divorce. *See* McCarty v. McCarty, 453 U.S. 210, 232 (1981). Jurisdiction under the USFSPA is in the serviceperson's home state unless the serviceperson

Parker v. Parker[215] illustrates how a non-owning spouse "contributes" to the employed spouse's pension. David Parker appealed from the lower court's award to his ex-wife of one-third of his vested profit-sharing plan. He argued that his wife, who was a homemaker for most of the marriage, was not entitled to an equitable share of the plan because his employer was the only one who contributed to the plan.[216] The court reasoned that the couple would have probably foregone other purchases if the employer had not provided the retirement. However, because the plan was available, the wife put her own funds and her labor into other family efforts. "While David contributed to his profit sharing plan by virtue of his labor, Brenda contributed by virtue of domestic services and earned income enjoyed by both parties, rather than invested in only Brenda's name."[217]

Pensions, like marital homes, are not acquired in one transaction. The equity in pensions is built over a number of years and may include periods prior to, during, and after a marriage. In order to acknowledge the marital and non-marital sources of pensions, courts apply the source of funds rule to classify pensions.[218] The Mississippi Supreme Court used this

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agrees to jurisdiction in another state. 10 U.S.C. § 1408(c)(4) (1986). Direct payment from the federal government may be obtained if the non-member payee was married to the serviceperson during ten years of military service. 10 U.S.C. § 1408(a)(d). Direct payment is available only up to 50% of the retirement pay. 10 U.S.C. § 1408(a)(1). The USFSPA does not require division, it simply permits division under state domestic relations law.

In a decision predating the USFSPA, the United States Supreme Court held that military disability payments are not divisible. Mansell v. Mansell, 490 U.S. 581, 594-95 (1989). Military disability benefits are excluded from the USFSPA, thus, the *Mansell* decision continues to exclude military disability benefits from equitable distribution. 10 U.S.C. § 1201-1221. Nonetheless, civil service retirement pay and disability benefits are subject to division upon divorce, if state law classifies them as marital property. 5 U.S.C. § 8345(j)(1) (1987).

[215] 641 So. 2d 1133 (Miss. 1994).

[216] *Parker*, 641 So. 2d at 1137.

[217] *Id.* at 1139. *See also* Ferguson v. Ferguson, 639 So. 2d 921, 934 (Miss. 1994) (stating "[c]ontributions of domestic services . . . are . . . valid material contributions which indirectly contribute to any number of marital assets").

[218] *See supra* notes 87-89 and accompanying text. *See In re* Marriage of Daniel, 854 S.W.2d 489, 490 (Mo. Ct. App. 1993) (holding that percentage of contributions

approach to divide pensions in *Arthur v. Arthur.*[219] In that case, Jerry Arthur appealed a chancellor's award to his wife Peggy of one-half of his pension profit sharing fund.[220] He argued that Peggy was not entitled to any of funds accumulated prior to their 1978 marriage. The court agreed that funds accumulated before the marriage, as well as any interest on those funds, were Jerry's separate estate and not subject to equitable distribution.[221]

Determining the separate and marital portions of a defined contribution plan is fairly easy: simply determine the amount of contributions made prior to the marriage and the amount made during the marriage. Passive appreciation is then allocated proportionally to the separate and marital interests.[222] Defined benefit plans are more complicated. According to Turner, the most common method of determining separate and marital portions is to divide the total years of contribution up to the date of retirement by the years of contribution during the marriage. This fraction represents the marital portion of the retirement benefits. For example, if John worked at the same company for 36 years until retirement and was married to Sarah for 12 years of the employment, the marital portion of the retirement benefit would be one-third. Two-thirds would be John's separate property.[223]

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made by husband prior to marriage was separate non-marital property and that percentage contributed during marriage was marital property); Marshall v. Marshall, 688 S.W.2d 279, 280-81 (Ark. 1985) (concluding that portion of pension acquired through those contributions made prior to marriage constituted separate property); *In re* Hester, 856 P.2d 1048, 1049 (Or. Ct. App. 1993) (holding that when pension plan is determined by amount of employee contribution, use of time rule could cause inequitable results). Valuation may present a difficult problem in pension division. *See* Thomas W. Crockett & J. Randall Patterson, *Dividing the Property in a Marital Dissolution*, 62 MISS. L.J. 57, 78 (1992).

[219] 691 So. 2d 997 (1997).

[220] *Arthur*, 691 So. 2d at 1002. Jerry had worked at People's Construction Company since 1969, but he had been married to Peggy only since 1978. *Id.* at 1003.

[221] *Id.* at 1003-04. The case was reversed and remanded for a determination of the portion of the funds accumulated prior to the marriage. *Id.*

[222] TURNER, *supra* note 6, § 6.10, at 336.

[223] TURNER, *supra* note 6, § 6.10, at 340. *See* Askins v. Askins, 704 S.W.2d

Until recently, courts conflicted as to whether non-vested benefits could constitute divisible marital property. Today a majority of courts hold that they may be divided.[224] The difficulty of dividing unvested pensions in equitable distribution is really a problem of valuation. It is difficult to fix value because the pension depends partly on the contingency that the owning spouse may leave the position on which the pension depends. Although a few courts have actually developed formulas to account for this contingency, the approach taken by most courts is simply to defer division until the pension vests.[225] The Mississippi Supreme Court has yet to consider the issue of the divisibility of unvested pensions.

B. Personal Injury Awards

A majority of courts in dual classification states classify personal injury awards based upon the loss that is compensated by the award. Courts in these states look to whether the recovery replaces something that belonged to the marital partnership or the injured individual.[226] To the extent that the

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632, 633 (Ark. 1986) (stating that spouse was entitled to one-half of a fractional interest in retirement payments); Barbour v. Barbour, 464 A.2d 915, 918-19 (D.C. 1983) (holding that dividing years of marriage by number of years of husband's creditable service constituted approved method of determining benefits). According to Turner, a minority of courts follow the date of divorce approach using the divorce date rather than the date of retirement. Turner illustrates how this approach denies a non-owning spouse the appreciation attributable to the marital portion of the pension. TURNER, *supra* note 6, § 6.10, at 341.

[224] *See* Burns v. Burns, 847 S.W.2d 23, 26 (Ark. 1991) (holding that nonvested military benefits were not subject to division due to the fact that such benefits lacked characteristics of property such as cash value, loan value, and redemption value); Hennessey v. Hennessey, 551 So. 2d 597, 598 (Fla. Dist. Ct. App. 1989) (holding that nonvested pension plans were correctly considered, within definition, as marital property); Poe v. Poe, 711 S.W.2d 849, 857 (Ky. Ct. App. 1986) (holding that nonvested military pension was properly characterized as marital property in accord with federal law); Hatcher v. Hatcher, 343 N.W.2d 498, 503 (Mich. Ct. App. 1983) (holding that party must first prove that pension had valuable vested interest before it could be deemed marital property); Lemon v. Lemon, 537 N.E.2d 246, 249 (Ohio Ct. App. 1988) (holding that unvested pension should be considered as marital property and so divided due to fact that it had value).

[225] TURNER, *supra* note 6, § 6.09, at 332.

[226] OLDHAM, *supra* note 5, § 8.01, at 8-6.

award is compensation for pain and suffering, it is the separate property of the injured spouse, even if the payment is received during the marriage.[227] To the extent that it is compensation for wages lost during the marriage or for medical expenses paid with marital funds, the award is marital property.[228]

A minority of states classify personal injury awards as marital property, excepting portions of the award which represent post-divorce losses.[229] These states follow a mechanistic approach, concluding that because the statutory definition of separate property does not include personal injury awards, such awards are marital. Thus, the injured spouse's lost health is, in effect, considered a marital asset rather than the separate property of the injured spouse.

In a pre-*Ferguson* case, the Mississippi Supreme Court adopted the majority view when it rejected a wife's claim to her husband's personal injury award. In *Regan v. Regan*,[230] the Chancery Court equally divided a $107,000 certificate of deposit payable to Jeanette and Lloyd Regan as joint tenants.[231] The funds used to purchase the certificate were the proceeds of a $225,000 draft representing settlement of Lloyd's maritime personal injury claim. The draft was made jointly payable to Lloyd and Jeanette, as a part of settlement practice to extinguish any claims of the wife for loss of consortium. The court held that Jeanette was not entitled to share the certificate of deposit derived from Lloyd's personal injury claim.[232] Although it did not use the *Ferguson* classification terminology, the Court's decision reflects that personal injury awards are separate property of the injured spouse.[233]

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[227] *See* Jurek v. Jurek, 606 P.2d 812, 814 (Ariz. 1980) (stating that compensation for pain and suffering was separate property of injured spouse); Campbell v. Campbell, 339 S.E.2d 591, 593 (Ga. 1986) (same); Weakley v. Weakley, 731 S.W.2d 243, 246 (Ky. 1987) (same); Ward v. Ward, 453 N.W.2d 729, 732 (Minn. Ct. App. 1990) (same); Landwehr v. Landwehr, 545 A.2d 738, 742-43 (N.J. 1988) (same).

[228] *See Jurek*, 606 P. at 814 (holding award of lost wages was marital property); *Campbell*, 339 S.E.2d at 593 (same); *Weakley*, 731 S.W.2d at 244 (same); *Landwehr*, 545 A.2d at 743-44 (same).

[229] *See In re* Fjeldheim, 676 P.2d 1234, 1236 (Colo. Ct. App. 1983) (holding that personal injury settlement for pain and suffering is marital property); Boyce v. Boyce, 541 A.2d 614, 615 (D.C. 1988) (same); Maricle v. Maricle, 378 N.W.2d 855, 857 (Neb. 1985) (same); Kozich v. Kozich, 580 A.2d 390, 393 (Pa. Super. Ct. 1990) (same); Marsh v. Marsh, 437 S.E.2d 34, 36 (S.C. 1993).

[230] 507 So. 2d at 54 (Miss. 1987).

[231] *Regan*, 507 So. 2d at 56. The court based its action upon the rule that joint accounts are presumed to be vested in both parties decision in equal amounts. *Id.*; *see also* Reeves v. Reeves, 410 So. 2d 1300, 1303 (Miss. 1982) (holding majority rule requires names on joint accounts to be considered as joint contributors); Drummonds v. Drummonds, 156 So. 2d 819, 821 (Miss. 1963) (holding bank account as joint accumulation).

The *Regan* opinion illustrates a common difficulty with personal injury and other settlement awards. A lump sum settlement may represent marital claims or separate claims of the non-injured spouse in addition to the primary, and separate, personal injury claim of the injured spouse. In *Regan*, the court found it likely that the $225,000 lump sum represented Jeanette's claim for loss of consortium as well as Lloyd's claim. It directed the lower court to "determine the amount of the $225,0000 settlement attributable to the claims of Lloyd and the amount of that settlement attributable to the claims of Jeanette. The proportions could then easily be calculated from which it [would] follow that the certificate of deposit [would] be divided in those proportions."[234]

In states where personal injury awards are classified based upon the purpose of the award, courts tend to analyze workmens' compensation awards in the same manner. Payments for pain and suffering or disfigurement are the injured spouse's separate property, while wages lost during the marriage are marital property.[235] In states where personal injury awards for pain and suffering are deemed marital property, workmens' compensation awards tend to be treated in a similar manner.[236]

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[232] *Regan*, 507 So. 2d at 56.

[233] *Id.* (citing Amato v. Amato, 434 A.2d 639, 641-44 (N.J. Super Ct. App. 1981)). Interestingly, the court stated that "there is no evidence that Lloyd ever made any gift of one-half or any other part of the proceeds to Jeanette." *Id.* The court does not address the well-recognized rule that a spouse who titles separate property in the joint names of himself and his spouse is presumed to make a gift to that spouse. *See supra* notes 181-91 and accompanying text. The exact transactions are not clear from the decision. However, the funds were ultimately used to purchase a certificate of deposit jointly titled in both names, a transaction that would appear to raise the issue of spousal gifts arising from jointly titled property. *Regan*, 507 So. 2d at 56.

[234] *Id.* at 57.

[235] *See In re* Marriage of Smith, 817 P.2d 641, 644 (Colo. Ct. App. 1991) (hold-

Courts vary in their classification of disability benefits. Some treat disability benefits by analogy to personal injury awards, treating amounts that represent lost wages during the marriage or a lost marital pension as marital property and amounts paid for pain and suffering as separate property.[237] Other courts treat disability awards as retirement funds and hold that if the disability benefit was acquired during marriage the disability award was acquired with marital funds and is, therefore, marital property.[238]

C. *Professional Degrees and Good Will*

Division of ownership of professional practices has been one of the most controversial issues in equitable distribution. In the early years of equitable distribution, spouses of professionals argued that professional degrees and licenses should be "property" subject to equitable distribution. Thus, a lawyer's wife or a doctor's husband would ask that the court award them a portion of the degree and the earnings that would flow from the degree. With two exceptions,[239] courts rejected this attempt.[240]

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ing that workers' compensation benefits that compensated for loss of earning during the marriage were marital property and were not marital property if compensated for loss of post-dissolution earning capacity); Weisfield v. Weisfield, 513 So. 2d 1278, 1280-81 (Fla. Dist. Ct. App. 1987) (holding that workers' compensation paid to injured party for personal loss were sole property of that party and damages paid for economic loss during marriage are marital property).

[236] *See* Goode v. Goode, 692 S.W.2d 757, 759 (Ark. 1985) (classifying that workers' compensation claims as marital property); Lukas v. Lukas, 404 N.E.2d 545, 552 (Ill. App. Ct. 1980) (stating that parties treated workers' compensation funds as marital property).

[237] *See In re* Marriage of Anglin, 759 P.2d 1224, 1229 (Wash. Ct. App. 1988) (finding award based solely on disability was not marital asset).

[238] *See* Dunn v. Dunn, 811 S.W.2d 336, 339 (Ark. Ct. App. 1991) (holding that disability benefit was acquired during marriage and was marital property); Watson v. Watson, 379 N.W.2d 588, 592 (Minn. Ct. App. 1985) (establishing that disability annuity is marital property).

[239] *See* O'Brien v. O'Brien, 489 N.E.2d 712, 718-19 (N.Y. 1985).

[240] *See* Hughes v. Hughes, 438 So. 2d 146, 149 (Fla. Dist. Ct. App. 1983);

The current battlefield for divorcing professionals is the divisibility of the good will in a professional practice. The tangible assets and accounts of a professional practice clearly are divisible property; however, spouses of professionals frequently also seek an award that represents the practice's intangible good will.[241] Courts are sharply divided on the issue. Most courts to consider the issue have held that if good will can be sold on the open market, then good will may be divided as property subject to equitable distribution.[242] However, with respect to good will which cannot be sold—unrealizable good will—courts are divided.[243] Some courts adopt a bright line rule that unrealizable good will is simply not divisible.[244] Other courts hold that unrealizable good will is divisible only if the non-owning spouse proves that the good will is separate from the owning spouse's reputation.[245] Nevertheless, in still other states, unrealizable professional good will is considered divisible, including the good will in accounting firms,[246] law practices,[247] and medical practices.[248]

The Mississippi Supreme Court has not addressed this issue. However, in his dissent in *Ferguson*, Justice Lee raised the possibility that the court's declaration of equitable distribu-

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Inman v. Inman, 648 S.W.2d 847, 852 (Ky. 1982); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979).

[241] Good will represents the value of a practice or business that exceeds the value of the tangible assets of the business. TURNER, *supra* note 6, § 6.22, at 421.

[242] *See* Hunt v. Hunt, 698 P.2d 1168, 1170 (Alaska 1985); Hollander v. Hollander, 597 A.2d 1012, 1018 (Md. App. 1991); Buckl v. Buckl, 542 A.2d 65, 68-69 (Pa. Super. Ct. 1988).

[243] For example, the good will in an attorney's professional practice cannot be sold. *See* TURNER, *supra* note 6, § 6.22, at 422 n.566 (citing A.B.A. Comm. on Professional Ethics and Grievances, Formal Op. 266 (1945)).

[244] *See* Geesbreght v. Geesbreght, 570 S.W.2d 427, 436 (Tex. Civ. App. Ct. 1978).

[245] *See* Wilson v. Wilson, 741 S.W.2d 640, 647 (Ark. 1987); Thompson v. Thompson, 576 So. 2d 267, 270 (Fla. 1991).

[246] *See* Mitchell v. Mitchell, 732 P.2d 208, 211 (Ariz. 1987); Heller v. Heller, 672 S.W.2d 945, 947-48 (Ky. Ct. App. 1984).

[247] *See* McLean v. McLean, 374 S.E.2d 376, 385 (Ohio App. Ct. 1987).

[248] *See* Drake v. Drake, 809 S.W.2d 710, 713 (Ky. Ct. App. 1991); Kahn v. Kahn, 536 N.E.2d 678, 682 (Ohio App. Ct. 1987).

tion would result in division of professional practices. "[T]he majority's proposal would affect the ownership of the doctors' medical practice, the attorneys' law practice, the accountants' accounting practice, as well as the ownership of all existing or future property owned by the average hard-working citizens of Mississippi."[249]

If, when faced with the issue, the Mississippi Supreme Court joins those courts permitting division of unrealizable good will, divorce practitioners will face several critical issues. For instance, valuation of professional good will is difficult, it depends upon a variety of factors, and it may be accomplished by any of several valuation approaches.[250] Particularly in solo or small practices, the intangible value of the practice may flow from the personal reputation of the professional, rather than from good will which exists separate from that reputation. Thus, it will be important to distinguish the two, since an individual's skill and reputation is not property subject to division at divorce. In addition, courts must assure that a non-owning spouse does not benefit twice from recognition of divisible professional good will—once at the division stage and again in the calculation of alimony and child support. [251]

CONCLUSION

The *Ferguson* decision aligns Mississippi with the great majority of states that divide marital property based upon equitable distribution. On the plus side, the new system divides property in a way that corresponds much more closely to married couples' expectations. It also brings increased predictability to the practice. On the other hand, practitioners and judges face a new and complex body of rules classifying property as marital or separate. The classification system is not only complex, but is as yet relatively undefined in Mississippi law. Significant issues remain for direct resolution by the Mississippi Supreme Court or the legislature—the cutoff date for acquiring marital property; spousal efforts required to convert appreciation on separate property to marital; and the effect of commingling separate and marital property. In the meantime, practitioners may look to a wealth of case law in other states that provide support for a wide range of positions on these issues.

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[249] *Ferguson*, 639 So. 2d at 941-42.

[250] Crockett, *supra* note 50, at 427-28.

[251] *See generally* TURNER, *supra* note 6, § 6.22, at 421. The concern would be that the court would divide a portion of the practice's future earnings as divisible good will, but would also attribute that portion of the future earnings to the owning spouse in calculating alimony or child support.

MISSISSIPPI CONFLICT OF LAWS

Michael H. Hoffheimer[*]

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INTRODUCTION

Mississippi courts increasingly confront cases with multistate and multinational contacts in which some or all of the claims are governed by foreign law.[1] The law of conflict of laws has undergone dramatic changes in the past few decades, and Mississippi rules depart, often radically, both from traditional approaches and from approaches in other states. Conflicts law has become complicated further by the growth of federal constitutional restrictions on state choice-of-law rules and, in a few areas, by federal statutes and treaties binding on the states.[2]

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[1] Obvious reasons for the increase in such cases include the increase in litigation, the increasing mobility of individuals, and the growth of interstate and international commerce. Legal changes have also facilitated litigation in Mississippi of cases with attenuated connections with the state. *See, e.g.*, MISS. CODE ANN. § 13-3-57 (Supp. 1997) (general long-arm statute); International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (holding that service of process in state is not constitutional requirement for exercise of jurisdiction in personam).

This Article considers common problems that arise in Mississippi conflict-of-laws cases. Part I discusses the enforcement of foreign judgments. Part II considers Mississippi statutes of limitations with respect to foreign causes of action. Part III considers requirements for raising conflict-of-law issues in state and federal courts and procedures for proving the content of foreign laws. Part IV examines general choice-of-law rules in Mississippi.[3] Part V addresses special choice-of-law problems that arise in federal court. Part VI surveys important constitutional restrictions on the application of Mississippi law in cases that may be governed by other laws and also discusses special equal protection issues that can arise when Mississippi laws discriminate against persons based on their place of residence or citizenship. Part VII reviews limits placed by the doctrine of sovereign immunity on suits against foreign states and countries in state and federal courts in Mississippi.

I. ENFORCING JUDGMENTS

A. *Judgments From Other State and Federal Courts*

The Constitution requires Mississippi to give "full faith and credit" to judicial proceedings in the courts of other states.[4] Early federalist judges decided that the effect of a judgment would normally be determined by reference to the law of the state that entered the judgment.[5] Federal legislation authorized by the Constitution[6] provides specific procedural guidelines.[7] Although the Constitution and federal statutes do not mention what credit states must give federal court judgments, state courts must give similar full faith and credit to federal court judgments.[8]

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[2] U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[3] In addition to the treatment of choice-of-law problems in this Article, see the excellent discussion by Jeffrey Jackson, *Choice of Law*, *in* 1 JEFFREY JACKSON, MISSISSIPPI CIVIL PROCEDURE §§ 4-1 through 4-31 (1997), which is updated annually.

[4] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; and the Congress may by

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general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."). U.S. CONST. art. IV, § 1. The Constitution adopted the obligation to enforce judgments from other states from Article IV of the Articles of Confederation of 1777 ("Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.").

[5] "[T]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and . . . whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234, 235, (1818) (Marshall, C.J.); *see also* Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813) (Story, J.).

[6] U.S. CONST. art. IV, § 1.

[7] 28 U.S.C. § 1738 (1988):

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

See generally Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95 (1984). The procedure for proving nonjudicial records is set forth in 28 U.S.C. § 1739 (1988).

[8] Federal courts must recognize state judgments. St. John v. Wisconsin Employment Relations Bd., 340 U.S. 411, 414 (1951), and states must recognize federal judgments, Stoll v. Gottlieb, 305 U.S. 165, 172 (1938); Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U.S. 141, 157 (1887); Embry v. Palmer, 107 U.S. 3, 10 (1882). *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.15, at 695 (2d ed. 1993). Obviously, federal courts

Mississippi has adopted the Uniform Enforcement of Foreign Judgments Act, which applies to judgments entered by state and federal courts but not to judgments from foreign countries.[9] Under the Act, a judgment from a state or federal court may be authenticated in one of three ways: in accordance with the federal statute, in accordance with the state statutes, or in accordance with a rule adopted by the Mississippi Supreme Court. Once authenticated, the judgment can be filed with the clerk of the circuit court in any county where it is then treated like a Mississippi state court judgment.[10]

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must also recognize judgments from other federal courts. Occasionally, the theoretical source of the binding effect of federal law is questioned, and most authorities agree that federal judgments are binding as a matter of federal law, not because of principles derived from the Erie doctrine. *See generally id.* at 697. Federal legislation provides procedures for registering federal judgments. 28 U.S.C. § 1963 (1988).

[9] "In this act 'foreign judgment' means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." MISS. CODE ANN. § 11-7-301 (Supp. 1997). The great majority of states have adopted the Act. *See* UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (1964 Revised Act), 13 U.L.A. 13 (Supp. 1997). The Mississippi version is found at sections 11-7-301 through 11-7-309 of the Mississippi Code.

[10] MISS. CODE ANN. § 11-7-303 (Supp. 1997):

> Said clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court of any county in this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a circuit court of any county in this state and may be enforced or satisfied in like manner, subject to the provision of Section 15-1-45.

The Act provides, however, that a foreign tax judgment in favor of a foreign state for income taxes on benefits from a pension or retirement plan shall not operate as a property lien, nor can the judgment debtor's property be executed on to satisfy the foreign tax judgment. *See id.*; MISS. CODE ANN. § 85-3-52 (Supp. 1997). Although an enrolled judgment operates as a lien on the judgment debtor's property under Mississippi law, such foreign tax judgments are not accorded the same treatment. *See* MISS. CODE ANN. § 11-7-191 (Supp. 1997) (providing that judgments operate as liens after enrollment except for foreign tax judgments described in section 85-3-52).

Although the statute does not prohibit the enforcement of such foreign tax judgments, it excludes the most effective means for satisfying such judgments by limiting execution to some method, like garnishment, that does not touch the debtor's property. (Of course, clever judgment creditors will recognize that rights in bank accounts and income streams from retirement sources are themselves not property.) This limitation significantly reduces the foreign state's power to satisfy a

The Act provides for notice to the foreign judgment debtor,[11] a twenty-day waiting period before executing on the judgment,[12] and an opportunity for the judgment debtor to stay execution during any appeal taken in the foreign court[13] or when authorized under Mississippi law.[14]

To be entitled to full faith and credit, a judgment must be a final judgment[15] on the merits.[16] Default judgments are on

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judgment and immunizes whole categories of persons including those who moved property to Mississippi for the sole purpose of avoiding valid tax claims in another state. The exemption thus seems not only to be bad policy but inconsistent with the state's obligations under the Full Faith and Credit Clause. Though tax and penal claims that have not been reduced to judgment may not be covered by the Full Faith and Credit Clause, *see, e.g.,* Nelson v. George, 399 U.S. 224, 229 (1970), tax judgments are. *See* Milwaukee County v. M.E. White Co., 296 U.S. 268, 279 (1935) ("We conclude that a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes.").

[11] MISS. CODE ANN. § 11-7-305(1)-(2) (Supp. 1997).

[12] *Id.* § 11-7-305(3).

[13] *Id.* § 11-7-309(1). The stay is mandatory upon a showing that an appeal is pending or will be taken or that a stay has been granted. The stay is conditional upon showing that the judgment debtor has provided any security required by the foreign state. *Id.*

[14] *Id.* § 11-7-307(2). The stay is mandatory upon showing any grounds for staying enforcement under Mississippi law. But this stay is conditioned upon showing that security has been provided as required by Mississippi law. *Id.* § 11-7-307(2). For the procedure regulating stays in Mississippi, see MISS. R. CIV. P. 62. The Mississippi automatic ten-day stay without security, *id.* 62(a), should entitle the foreign judgment debtor to a comparable stay without the need to provide security, but the statute does not make the stay automatic and requires the judgment debtor to make a showing to the circuit court that the judgment debtor is entitled to the stay.

[15] *E.g.,* Davis v. Davis, 558 So. 2d 814, 817 (Miss. 1990) ("This State is required by the United States Constitution . . . to give full faith and credit to all final judgments. . . ."). "[I]t is generally assumed that recognition, in the interstate setting, is constitutionally required only for *final* decrees and judgments." EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS, § 24.8 at 963 (2d ed. 1992). *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, § 112[b], at 342 (2d ed. 1993) ("A judgment not final under the law of the state which rendered it is not entitled to full faith and credit."). Finality is determined by the law of the jurisdiction that entered judgment. SCOLES & HAY, *supra,* § 24.8, at 963. For example, whether a judgment is final and enforceable pending post trial motions or on appeal depends on the law of the jurisdiction that entered the judgment. *Id.*

[16] Justice Banks explained the general requirements for claim preclusion: "For the bar of res judicata to apply, four identities must be present: (1) identity of

the merits, but judgments dismissing an action for lack of jurisdiction, lack of proper venue, or improper joinder are not on the merits.[17] The judgment must have been entered by a court with proper jurisdiction.[18] While some authorities sug-

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the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of the person against whom the claim is made." Little v. V & G Welding Supply, Inc., No. 95-CA-00070-SCT, slip op. (Miss. Dec. 31, 1997). Confusing language in Mississippi cases suggests that there needs to have been actual judicial consideration of the claims in the other state: "Additionally, for full faith and credit to apply, the foreign court must have addressed the merits of the case in rendering its judgment." *Davis*, 558 So. 2d at 818 (citing Lee v. Swain Bldg. Materials Co., 529 So. 2d 188, 190 (Miss. 1988)). In *Lee*, the court observed (in holding dismissals on ground of limitations not subject to full faith and credit), "[a] condition precedent for application of the full faith and credit clause is that the judgment in the sister state has addressed the merits of the case." *Lee*, 529 So. 2d at 190. While it is true that a judgment must be "on the merits" in order to be subject to full faith and credit, it is not true that the court entering judgment had to have actually considered or addressed the merits. *See Little*, slip op. (barring relitigation of closely related claims that were not presented in prior case). So, too, a valid default judgment is binding.

Like default judgments, some other judgments resulting from procedural defaults and judgments dismissing a plaintiff's action for failure to prosecute or for multiple dismissals count as "on the merits" for purposes of the Full Faith and Credit Clause. The best guide for whether a judgment is on the merits is thus not whether a court actually addressed the claim but whether the party had an *opportunity* to litigate the claim. *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 112[a], at 341-42; SCOLES & HAY, *supra* note 15, § 24.24, at 988. A judgment cannot bar claims by persons who were not parties. Coleman v. Mississippi Farm Bur. Ins. Co., No. 95-CT-00868, slip op. (Miss. Jan. 29, 1998). And normally a judgment does not bar new claims against nonparties. But for an extremely broad application of claim preclusion against nonparties deemed in privity with parties in prior litigation, see *Little*, slip op.

[17] *See* Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723 F.2d 357, 360 (3d Cir. 1983) (holding dismissal for lack of personal jurisdiction not judgment on merits). *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 112[a], at 342.

[18] *Davis*, 558 So. 2d at 817 (citing Sollitt v. Robertson, 544 So. 2d 1378, 1381 (Miss. 1989)) ("This State is required by the United States Constitution . . . to give full faith and credit to all final judgments of other states and federal courts unless (1) 'the foreign judgment itself was obtained as a result of some false representation without which the judgment would not have been rendered' [citation omitted] or (2) 'the rendering court did not have jurisdiction over the parties or the subject matter.'"). As this language suggests, the sort of fraud that will permit Mississippi to disregard a judgment from another state must be something more than mere misrepresentations made in the course of the out-of-state pro-

gest that judgments that are modifiable under foreign law need not be enforced,[19] the trend is towards judicial enforcement of important modifiable judgments such as custody and support decrees either on grounds of comity or pursuant to the Full Faith and Credit Clause.[20] The area of interstate en-

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ceedings. It must be what used to be called "extrinsic" fraud that affects the jurisdiction of the foreign court. *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 112[c], at 344-45; SCOLES & HAY, *supra* note 15, § 24.17, at 977; Comment, *The Value of the Distinction Between Direct and Collateral Attacks on Judgments*, 66 Yale L.J. 526 (1957).

Personal jurisdiction in the rendering state's court is a prerequisite. National Exch. Bank v. Wiley, 195 U.S. 257, 263 (1904); Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287, 294 (1890). *See* Pennoyer v. Neff, 95 U.S. 714, 728 (1877) (relying on personal jurisdiction exception to obligation to give foreign state judgment full faith and credit as authority in finding that due process prohibited enforcement of judgment from court without personal jurisdiction). A mere empty recitation by the foreign state court that it has jurisdiction is not binding. Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 461 (1873). But the actual determination by the foreign court that it had jurisdiction is binding. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 526 (1931). And the defendant will have established personal jurisdiction by consent or waiver if he appeared and did not timely raise the issue. *See, e.g.*, MISS. R. CIV. P. 12(h)(1) ("A defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."); FED R. CIV. P. 12 (h)(1) (same).

Notwithstanding dicta in many old cases that subject matter jurisdiction is a prerequisite for a judgment to be entitled to full faith and credit, *e.g.*, *Pennoyer*, 95 U.S. at 729; *Davis*, 558 So. 2d at 817, a party may not collaterally challenge the first court's lack of subject matter jurisdiction when the party appeared and litigated and lost on that issue in the first court. The general rule is that a judgment is entitled to full faith and credit when issues of jurisdiction were litigated and decided by the first court in rendering its original judgment. Durfee v. Duke, 375 U.S. 106, 111 (1963). *Accord* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378 (1940) (holding that collateral attack on federal court's jurisdiction was barred even though issue was not raised in original federal action when first court provided opportunity to litigate issue). *But see* Kalb v. Feuerstein, 308 U.S. 433, 444 (1940) (holding that prior litigation in state court after effective date of automatic stay of bankruptcy did not preclude subsequent litigation). *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 112[d][2], at 346-48; SCOLES & HAY, *supra* note 15, § 24.14-24.15, at 972-74. Even when the first state's court lacked jurisdiction, its judgment should be open to collateral attack in another state only when such an attack is permitted by the law of the first state. SCOLES & HAY, *supra* note 15, § 24.17, at 976.

[19] RICHMAN & REYNOLDS, *supra* note 16, § 112[b], at 342-43.

[20] *See* Laskosky v. Laskosky, 504 So. 2d 726, 731 (Miss. 1987) (holding that

forcement of support obligations and custody rights is extensively regulated by legislation.[21]

Foreign court judgments dismissing causes of action under statutes of limitations present special problems. Such dismissals were not traditionally considered to be on the merits and consequently were not binding under the Full Faith and Credit Clause.[22] This practice was grounded on the traditional assumption that most statutes of limitations were procedural rather than substantive. A dismissal that operated to affect substantive rights—for example, a dismissal that vested title in the defendant by means of adverse possession—would presumably be entitled to full faith and credit. But today many states consider statutes of limitations to be substantive. In Mississippi, for example, while foreign statutes of limitations are treated as procedural, the expiration of the local limitations periods operates to extinguish substantive rights as well as to cut off any remedy.[23] The traditional rule that

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interim Canadian custody decree should be accorded comity when challenged by mother, Mississippi resident, absent showing that decree was not in child's best interest). *See generally* SCOLES & HAY, *supra* note 15, § 15.34 at 537 ("[T]he clear practice of state courts is to recognize the foreign support order . . . to give the parties an opportunity to litigate issues relative to modification, and then to issue a local decree of enforcement, whether this is done on a theory of comity or under Full Faith and Credit.").

[21] *See generally* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1988); Full Faith and Credit for Child Support Orders, 28 U.S.C. § 1738B (1997); Uniform Child Custody Jurisdiction Act, MISS. CODE ANN. § 93-23-1 (1982), Davis v. Davis, 558 So. 2d 814, 818 (Miss. 1990) (affirming recognition of foreign judgments for support).

[22] Union Nat'l Bank v. Lamb, 337 U.S. 38, 46 (1949) (Frankfurter, J., dissenting in part); Brent v. Bank of Washington, 35 U.S. (10 Pet.) 596, 616 (1836). *See* Lee v. Swain Bldg. Materials Co. 529 So. 2d 188, 191 (Miss. 1988) (holding Mississippi was not required by full faith and credit to recognize statute of limitations dismissal from another state). *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 112[a] at 342; SCOLES & HAY, *supra* note 15 § 24.24, at 986 ("[A] judgment dismissing a cause because of the local statute of limitations will not bar a subsequent action on the identical claim in the courts of a sister-state.").

[23] MISS. CODE ANN. § 15-1-3 (1972) states: "The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy. However, the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon." *See* Lowery v. Statewide Healthcare Serv., Inc., 585 So. 2d 778, 780 (Miss. 1991); Greene v. Greene, 110

statutes of limitations dismissals are not on the merits thus constitutes a federally created exception to full faith and credit.[24] To the extent the exception was rooted in uniform state practices that have changed, the better approach, one more consistent with the historical rationale for the exception, might be for states to be constitutionally compelled by full faith and credit to give preclusive effect to foreign dismissals when they are considered to be on the merits by the courts that dismissed the actions.[25]

While Mississippi may not be constitutionally required to give full faith and credit to statutes of limitations dismissals

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So. 218, 223 (Miss. 1926) (holding extinguished claim could not be raised as setoff); McDaniel v. Short, 90 So. 186, 1877 (Miss. 1921), Proctor v. Hart, 16 So. 595, 596 (Miss. 1894).

[24] Justice Scalia emphasized that statutes of limitations were not binding on other jurisdictions historically because they were considered procedural rather than substantive. He found this view supported both by private international law (under which states used forum law for limitations purposes) and local common law (under which the expirations of limitations extinguished the remedy but not the right). *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988) (holding that Kansas was not prohibited by full faith and credit from applying longer forum limitations to action in which party had not had significant aggregation of contacts with Kansas and in which, therefore, due process prohibited application of substantive Kansas law).

But the Court has long recognized that fundamentally different issues are presented when the foreign state has entered judgment on a claim. Fauntleroy v. Lum, 210 U.S. 230, 237 (1908). And it is not clear that the traditional characterization of *dismissals* as not "on the merits" flowed from a deliberate federal policy that such actions need not be accorded full faith and credit or from the implicit assumption that such dismissals were not considered "on the merits" by the states that entered them. If the federal exception developed by implicit reference to the characterization of the decisions by the state courts, it follows that the federal exception should be modified or abandoned as state courts themselves alter their characterization of their decisions.

[25] Under this approach, for example, a Mississippi decision dismissing an action that arose in Mississippi under a Mississippi statute of limitations might be "on the merits," as it not only precludes relitigation in Mississippi but operates to extinguish the underlying claims. In contrast, a Mississippi dismissal that applied the Mississippi limitations period to a foreign claim might not be "on the merits" since the state's reasons for barring foreign claims advance procedural goals: to preserve judicial resources, to treat foreign claims like Mississippi claims, and to discourage forum shopping. Likewise, a Mississippi dismissal applying the foreign limitations period under the Mississippi borrowing statute would advance the same procedural goals and would accordingly be not "on the merits."

from other states, neither is it prohibited from doing so. Nevertheless, the Mississippi Supreme Court has decided that, in the absence of constitutional obligations to recognize dismissals from other state courts, it will permit such claims to be relitigated[26]—at least when the statute of limitations is deemed procedural.[27]

In contrast, federal courts in Mississippi dismiss claims that have been dismissed as time barred by other courts, even though Mississippi state courts would permit such claims to be relitigated.[28] This is not inconsistent with federal courts' obligations under the Rules of Decision Act[29] and the *Erie* doctrine[30] to apply Mississippi statutes of limitations, for the res judicata effect of judgments in federal court is a matter of federal law. In applying their own principles of res judicata, federal courts bar claims that have been previously dismissed by another state, deferring to the law of the rendering state[31] rather than to the law of the state in which they sit.

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[26] In *Lee*, 529 So. 2d at 190, Louisiana residents injured in an accident in Louisiana sought to relitigate their tort claim in Mississippi against a Mississippi corporation with its principal place of business in Louisiana after the claim had been dismissed with prejudice by Louisiana courts. Justice Hawkins held that the claim could be relitigated as it was not "on the merits." *Id.* at 190-91. In *Patton v. Mack Trucks, Inc.*, 556 So. 2d 679, 680 (Miss. 1989), Pennsylvania plaintiffs sought to relitigate a claim against a Pennsylvania defendant that arose out of a truck accident on Pennsylvania roads after the action had been dismissed by a Pennsylvania court under the Pennsylvania statute of limitations. Justice Robertson concluded that the precedent of *Lee* compelled him to hold that the Pennsylvania judgment was not binding and that the action was governed by the longer Mississippi statute of limitations. *Patton*, 556 So. 2d at 680. Justices Blass and Prather dissented, arguing that, though the Full Faith and Credit Clause did not *require* dismissal, "we ought to . . . hold that we will not entertain such actions where there is no substantial nexus between the State of Mississippi and the parties or interests that are present in the litigation." *Id.* at 681.

The problem presented by these cases with weak contacts with Mississippi was aggravated by Mississippi case law that refused to apply forum non conveniens to dismiss such actions when they were barred elsewhere by a statute of limitations. Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 564 (Miss. 1988).

Most such cases would now be dismissed in Mississippi because the general statute of limitations has been shortened from six to three years and because Mississippi has adopted a borrowing statute that effectively bars out-of-state claims when they are barred by the foreign limitations period. See *infra* notes 87-101 and accompanying text.

[27] For the distinction between substantive and procedural statutes of limitations, see *infra* notes 88-91 and accompanying text.

[28] *See* Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc., 870 F.2d 1044, 1046 (5th Cir. 1989) (holding dismissal by Louisiana court of claim as time barred operated as claim "on the merits" to bar relitigation, even though Mississippi statute of limitations had not yet expired); *see also* Austin v. Super Valu Stores, Inc., 31 F.3d 615, 618 (8th Cir. 1994) (reaching same result by referring to res judicata law of Louisiana). *Contra* Warner v. Buffalo Drydock Co., 67 F.2d 540, 541 (2d Cir. 1933).

No public policy exception permits a state to escape its obligation to accord full faith and credit to judgments from other states, and Mississippi cannot avoid enforcing a judgment from another state because the original cause of action is repugnant to Mississippi law.[32] Under older authority, now

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[29] 28 U.S.C. § 1652 (1988) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

Although the historical context of this old statute and the term "rules of decision" make it questionable whether Congress expected the statute to apply to statutes of limitations (or at least "procedural" ones), it has been so applied by federal courts even in cases based on federal question jurisdiction. *See* M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 277 (1830); Baker v. F&F Inv., 420 F.2d 1191, 1194 (7th Cir. 1970).

[30] State statutes of limitations are "substantive" for purposes of the Erie Doctrine and apply in diversity actions brought in federal court. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

[31] The theoretical sources of distinct principles of res judicata in federal court are discussed in Ronald E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 742-50 (1976).

[32] The lead case, *Fauntleroy v. Lum*, 210 U.S. 230 (1908), arose in Mississippi when gambling was illegal and criminal. *Fauntleroy*, 210 U.S. at 234. Mississippi statutes prohibited the sale of cotton futures, criminalized such conduct, and provided that such contracts "shall not be enforced in any court." *Id.* The parties to such a prohibited contract submitted it to arbitration, and the plaintiff commenced an action in Missouri on the arbitration award, serving the defendant while he was temporarily in Missouri. *Id.* The defendant did not raise illegality as a defense in the arbitration proceedings, and the Missouri court would not allow the defendant to raise illegality and entered judgment on the arbitration award. *Id.*

The plaintiff sought to enforce the Missouri judgment in Mississippi, but Mississippi courts refused to recognize it. *Id.* The Supreme Court reversed, requiring Mississippi to enforce the Missouri judgment even though the original obligation was unenforceable and criminal under Mississippi law. *Id.* at 237.

Although the Court was divided, four justices dissenting, and the holding could be explained on other grounds, *Fauntleroy* has been consistently read as much questioned, full faith and credit did not require a state to recognize another state's penal judgment.[33] This exception, however, did *not* extend to foreign judgments for punitive damages, which are entitled to full faith and credit.[34]

Full faith and credit extends to some equity decrees, notably divorce decrees (entered by a state where one of the parties was domiciled),[35] equitable orders for the payment of money,[36] and declaratory judgments.[37] But other orders enjoining conduct may not be binding under full faith and credit when the conduct enjoined offends Mississippi public policy or when the foreign court order interferes with matters within Mississippi's jurisdiction.[38] Applying principles of comity, old-

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authority for the absolute proposition that there is no public policy exception to full faith and credit. Although Scoles and Hay suggest that the holding is justified by the underlying policy of precluding relitigation of issues that have been determined after a full opportunity to litigate, SCOLES & HAY, *supra* note 15, § 24.20, at 980, the procedural history of the case makes it uncertain whether there was an opportunity to raise the defense of illegality or to argue the applicability of Mississippi law in the foreign court.

[33] The issue was specifically left open in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 279 (1935). Scoles and Hay discuss the history of and question the rule. SCOLES & HAY, *supra* note 15, § 24.23, at 984-86.

[34] Huntington v. Attrill, 146 U.S. 657, 686 (1892).

[35] The Court in *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) [Williams I], held that North Carolina must recognize even an ex parte divorce decree from a Nevada court, provided that the Nevada court had jurisdiction. But in *Williams v. North Carolina*, 325 U.S. 226, 241 (1945) [Williams II], the Court upheld the North Carolina decision to disregard the Nevada decree after North Carolina concluded that the party obtaining the divorce had not obtained valid domicile in Nevada.

[36] Barber v. Barber, 323 U.S. 77, 86 (1944); Sistare v. Sistare, 218 U.S. 1, 26 (1910).

[37] *See generally* SCOLES & HAY, *supra* note 15, §§ 24.9-24.10, at 964-67; Willis L.M. Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 190 (1957).

[38] For example, in *James v. Grand Trunk W.R.R. Co.*, 152 N.E.2d 858, 864 (Ill. 1958), Illinois disregarded the injunction issued by another state that ordered a party to terminate litigation in Illinois. So, too, a foreign judgment attempting directly to affect property rights in real property in Mississippi is not subject to full faith and credit, Fall v. Eastin, 215 U.S. 1, 13 (1909), though parties to out-of-state proceedings affecting property rights in Mississippi are bound by that decision (at least when the foreign court actually determined that it had jurisdiction over the property), Durfee v. Duke, 375 U.S. 106, 116 (1963).

er Mississippi cases enforced foreign injunctions restraining foreign parties from prosecuting claims in Mississippi courts,[39] but the Mississippi Supreme Court has more recently declined to honor such an injunction designed to prevent a litigant from obtaining more favorable law in Mississippi. Thus a foreign court order will not be recognized when it interferes with a plaintiff's right to litigate in Mississippi.[40]

Full faith and credit also extends to administrative determinations in other states.[41] Workers' compensation decisions are covered by the Full Faith and Credit Clause but are not treated exactly the same as judgments from courts. While the credit due a state judgment is determined by reference to the law of the state that rendered it, the United States Supreme Court has permitted certain supplemental workers' compensation awards even when such additional awards are barred by the law of the state granting the first award.[42] The second state must respect the factual determinations of the first workers' compensation tribunal[43] but need not recognize the limits on or finality of the initial award. The Supreme Court justified permitting supplemental awards by balancing the first forum's interest in finality against the second forum's interest in compensation.[44] The underlying rationale for the exceptional treatment of workers' compensation is open to criticism and failed to gain a majority on the Court,[45] but a plurality defended the special treatment of workers' compensation by emphasizing differences between informal workers' compensation proceedings and judicial proceedings. The plurality pointed out that workers' compensation claims are presented informally, often without advice of counsel, without due consideration of choices of forum, and, in many states, without the opportunity for the workers' compensation tribunals themselves to apply foreign law.[46] The problem with the plurality's explanation, criticized by the concurrence and commentators, is that similar informalities characterize many other kinds of proceedings, including some court proceedings.[47]

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[39] *See* Equitable Life Assurance Soc'y v. Gex' Estate, 186 So. 660, 663 (Miss. 1939) (holding that Louisiana court's preliminary order restraining Louisiana resident from further prosecution of Mississippi case should be recognized); Fisher v. Pacific Mut. Life Ins. Co., 72 So. 846, 848 (Miss. 1916) (recognizing order of Tennessee court enjoining Tennessee resident from filing action against corporation doing business in Tennessee). *See generally* Robert W. Wall, Jr., Note, *Conflict of Laws—Injunction Restraining Party From Bringing Suit in Another State—Recognition of Decree in Second State*, 12 MISS. L.J. 512, 512-15 (1940).

[40] Tri-State Transit Co. v. Mondy, 12 So. 2d 920, 923-24 (Miss. 1943). In affirming denial of injunction, the court pointed out that the chancellor had found that the plaintiff had established residence in Mississippi and that the defendant's fears that the case would be governed by less favorable Mississippi law were groundless because Mississippi would apply (at that time) the substantive law of Louisiana. *Mondy*, 12 So. 2d at 922. The opinion nonetheless stated a broad rule against the issuance of an injunction based on a foreign injunction: "[W]e do not think that [foreign] injunction can be made the ground for the issuance of another injunction here. Its validity and effect are matters to be, and properly may be, pleaded and contested as a defense in the law action, and, as to that, the Transit Company has an adequate remedy at law." *Id.* at 923-24.

[41] *See generally* SCOLES & HAY, *supra* note 15, § 24.11, at 967 (2d ed. 1992). The omission of a reference to state administrative agencies in 28 U.S.C. § 1738 of the United States Code does not indicate a congressional intent to exclude the decisions of such agencies, since § 1738 predates the development of such agencies. University of Tennessee v. Elliott, 478 U.S. 788, 794-95 (1986). The special treatment of workers' compensation exception awards is discussed *infra* notes 42-47 and accompanying text.

[42] Industrial Comm'n v. McCartin, 330 U.S. 622, 628 (1947) (holding that

When faced with inconsistent final judgments from other states, a court must give full faith and credit to the most recent judgment.[48]

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second award was permitted unless statute law of first state contained "unmistakable language" that barred second award by another state), *questioned and possibly overruled by* Thomas v. Washington Gas Light Co., 448 U.S. 261, 277 (1980).

[43] *Thomas*, 448 U.S. at 281 ("There is neither inconsistency nor double recovery.").

[44] The Court held that full faith and credit did not prevent a subsequent supplemental workers' compensation award in the District of Columbia even though barred by the law of Virginia which granted first award. *Id.* at 286.

[45] Three justices disagreed with the plurality's reasoning but concurred nevertheless because of precedent. *Id.* at 289 (White J., concurring) ("Although I find *McCartin* to rest on questionable foundations, I am not now prepared to overrule it.").

[46] *Id.* at 282, 284.

[47] *Id.* at 286 (White, J., concurring); RICHMAN & REYNOLDS, *supra* note 15, § 114[c][3]-[4], at 356-59 (criticizing rationale of plurality opinion); SCOLES & HAY, *supra* note 15, § 24.26, at 990-91. Justices Marshall and Rehnquist dissented, arguing that the Court should abandon the workers' compensation exception altogether. *Thomas*, 448 U.S. at 295-96.

[48] Treines v. Sunshine Mining Co., 308 U.S. 66, 74-75 (1939). The Court justi-

B. Foreign Country Judgments

The Constitution does not compel Mississippi to give full faith and credit to judgments from foreign countries, nor is there a federal treaty that requires the enforcement of foreign country judgments. Nevertheless, Mississippi courts will enforce foreign country judgments under principles of res judicata and comity.[49] Requirements for enforcing foreign country judgments were set forth by influential nineteenth-century treatises and are collectively known as the Kent-Story Rule. Justice Gray expressed the rule in the influential opinion in *Hilton v. Guyot*:

> In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system or jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[50]

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fied the last-in-time rule by a presumption that the most recent decision correctly resolved whether prior decisions were entitled to full faith and credit. *Treines*, 308 U.S. at 74-5. Accord Sutton v. Leib, 342 U.S. 402, 406 (1952) (stating that purpose of Full Faith and Credit Clause was to avoid relitigation of adjudicated issues). *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 111[b], at 340-41; SCOLES & HAY, *supra* note 15, § 24.29, at 993; Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: the Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

[49] *See, e.g.*, Laskosky v. Laskosky, 504 So. 2d 726, 730 (Miss. 1987) (holding foreign decree enforceable unless contrary to Mississippi public policy).

[50] Hilton v. Guyot, 159 U.S. 113, 202-03 (1895). Justice Gray elsewhere for-

Under this rule, a foreign country judgment from a judicial system that provides impartial tribunals is enforceable unless 1) the foreign court lacked jurisdiction, 2) the judgment was procured by fraud, 3) the judgment was founded on clear mistake or irregularity, 4) the judgment was bad by the law of the place where it was rendered, or 5) the foreign jurisdiction rendering the judgment did not recognize American judgments. Different procedures, such as the admission of unsworn or hearsay evidence or the absence of a right to cross-examine, do not prevent enforcement of the foreign country judgment.[51]

The Kent-Story Rule is similar to the approach set forth in the Uniform Foreign Country Money-Judgment Recognition Act which has been adopted by twenty-six states and the District of Columbia (but not Mississippi).[52] Under the Act, a foreign country judgment granting or denying a claim for money is "enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit"[53] when the

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mulated the rule slightly differently:

> When . . . the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

Id. at 205-06.

[51] *Id.* at 204-05.

[52] For the list of jurisdictions that have adopted the Act, see UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 13-14 (Supp. 1997).

[53] UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, § 3, 13 U.L.A. 265 (1986). The conversion of a judgment in foreign currency presents its own problems. In 1989 a Uniform Foreign-Money Claims Act was proposed to deal with the problems of converting currency amounts contained in judgments. It has already been adopted by 21 states and the District of Columbia, but not by Mississippi. *See* UNIF. FOREIGN MONEY-JUDGMENTS CLAIMS ACT, 13 U.L.A. 60-76 (Supp. 1997); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 101, 144

judgment has become "final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal."[54] Nevertheless, such a judgment is not conclusive if:

> (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
> (2) the foreign court did not have personal jurisdiction over the defendant; or
> (3) the foreign court did not have jurisdiction over the subject matter.[55]

Moreover, unlike the judgment from a sister state, a foreign country money judgment need not be recognized if:

> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
> (2) the judgment was obtained by fraud;
> (3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;
> (4) the judgment conflicts with another final and conclusive judgment;
> (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

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(1971); *see generally* SCOLES & HAY, *supra* note 15, § 24.40, at 1008-09

[54] UNIF. FOREIGN COUNTRY MONEY-JUDGMENTS RECOGNITION ACT § 2, 13 U.L.A. 264 (1986). The Act permits the court to stay proceedings "[i]f the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment . . . . " *Id.* § 6.

[55] *Id.* § 4(a), at 268. The comment to the act does not explain what "is not conclusive" means. In the context of *Hilton v. Guyot*, this terminology would suggest that the foreign country judgment might still be rebuttable prima facie evidence of the obligation. But it seems unfair to allow such effect to be given to such a seriously defective judgment—indeed, it raises due process concerns. Accordingly, the better interpretation of "is not conclusive" would be that the words mean *must not be* given preclusive effect (and, perhaps, must not be given any evidentiary weight). Scoles & Hay assume that the language sets forth conditions or prerequisites. SCOLES & HAY, *supra* note 15, § 24.36, at 1001.

> (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.[56]

Accordingly, a foreign country judgment can be challenged on grounds that the underlying claim offended Mississippi public policy, whereas a money judgment from a sister state cannot be denied enforcement on public policy grounds.

Hilton imposed a fifth requirement for enforcement of foreign country judgments—reciprocity. It held that French judgments should not be given preclusive effect because France at that time did not give preclusive effect to United States judgments.[57] The reciprocity requirement was controversial from the start[58] and has been criticized by scholars.[59] Reciprocity punishes private litigants in order to advance a policy goal of encouraging foreign states to recognize the forum's own judgments. Reciprocity also punishes the forum in order to promote this policy goal, because the forum shares the foreign court's interest in finality. And it has been questioned whether such foreign policy goals are an appropriate concern of the judiciary in the first place.[60]

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[56] UNIF. FOREIGN COUNTRY MONEY-JUDGMENTS RECOGNITION ACT, § 4, 13 U.L.A. 268 (1986).

[57] *Hilton*, 159 U.S. at 227 ("[J]udgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.").

[58] Chief Justice Fuller, along with three other Justices, dissented. *Id.* at 229-34 (Fuller, C.J., dissenting). In addition to arguing that the foreign judgment vested private rights that should be respected, the dissent argued that the case should be governed by normal principles of res judicata which advance the "public policy that there should be an end of litigation." *Id.* at 229 (Fuller, C.J., dissenting).

[59] RICHMAN & REYNOLDS, *supra* note 15, § 109, at 327; SCOLES & HAY, *supra* note 15, § 24.34, at 998 ("It makes little sense to penalize a private person (the foreign plaintiff) for the acts of his country's courts. The policies that control the law of res judicata generally—fairness, repose, and judicial economy—should govern here as well.").

[60] "The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." *Hilton*, 159 U.S. at 234 (Fuller, C.J., dissenting.).

Announced as a rule of federal common law in a diversity case, the *Hilton* decision was never binding on states, and its vitality in federal courts has been questioned under the *Erie* doctrine.[61] Neither statute nor case law in Mississippi requires reciprocity.

C. Collateral Estoppel or Issue-Preclusive Effect of Foreign Judgment

The previous sections have considered the enforcement of claims between parties that have been reduced to final judgment in foreign jurisdictions. When there is a valid judgment from another jurisdiction, it stands to reason that the foreign jurisdiction's law should also determine what legal claims have been determined by the judgment. In other words, the law of the state or country rendering the judgment should control the bar or merger effect of the foreign judgment.[62]

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[61] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts have no authority to make general common law). *See* Tahan v. Hodgson, 662 F.2d 862, 867 n.21 (D.C. Cir. 1981) ("[T]he federal courts may now be required by *Erie* [citation omitted] to apply the rule of the state in which they sit as to the measure of respect that should be accorded the judgment of a foreign nation."). *See generally* SCOLES & HAY, *supra* note 15, § 24.35, at 1000 ("[T]he *Hilton* decision therefore probably no longer binds federal courts in diversity cases and its authority seems negligible [footnotes citing federal cases that have declined to follow *Hilton* omitted]."). Some states require reciprocity either as a matter of case law or by statute. In such cases, the federal court may be required by the Erie doctrine to impose reciprocity as a condition to enforcing a foreign country judgment. *See, e.g.,* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1004 (5th Cir. 1990) (applying Texas state law, including reciprocity requirement, and refusing to enforce foreign judgment).

[62] For example, if a compulsory counterclaim has been waived according to foreign law because it was not raised in foreign proceedings, it would erode the value of the foreign judgment to permit the counterclaim to be litigated in Mississippi just because it does not qualify as a compulsory counterclaim under Mississippi rules. Conversely, it would be unfair to bar litigation of a counterclaim that was treated as permissive under foreign law just because Mississippi treats it as compulsory, for the party might have relied on the nonpreclusive effect of the judgment under the foreign law in deciding not to raise the counterclaim. *But cf.* Little v. V & G Welding Supply, Inc., No. 95-CA-00070-SCT (Miss. Dec. 31, 1997) (relying on Mississippi law of res judicata to dismiss claims closely related to claims litigated against different parties in prior federal case). Apparently no party in *Little* argued that the finality of the prior federal judgment should be

Sometimes, however, parties introduce a foreign judgment not to enforce or bar claims reduced to judgment but rather to prevent relitigation of certain facts or issues that were determined in the foreign judgment.[63] Such cases do not directly concern the enforcement of the rights reduced to judgment but rather the evidentiary or procedural weight to be accorded the foreign court's determination of disputed issues.[64] Accordingly,

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determined by federal rather than Mississippi law.

[63] This is called "issue preclusion" or "collateral estoppel"—the terms mean the same thing, but issue preclusion is favored by more recent scholars as it is a more apt description. For example, a car driver brings a law suit against a truck driver in Arkansas for an accident in Arkansas. The truck driver defends on the theory that he was not the driver of the truck that injured car driver, and the jury returns a verdict for the defendant truck driver. If the car driver commences a separate action in Mississippi against the Mississippi trucking company that employed the truck driver on a theory of respondeat superior, the trucking company might argue that the *claim* against the truck driver is barred by the judgment in favor of its driver. But even if the claim is not barred altogether as a matter of law, the trucking company might seek to prevent relitigation of the factual issue of the truck driver's identity as the tortfeasor because that issue was adversely determined against the plaintiff in prior proceedings in which the issue was fully litigated and necessary to the determination.

The requirements for issue preclusion are: 1) the very same fact or issue, 2) must have been actually litigated, 3) determined by the court, and 3) necessary to the determination. *See generally* FRIEDENTHAL ET AL., *supra* note 8, § 14.13, at 683; FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 11.17 608 (4th ed. 1992). Only parties in the first proceedings, or persons in privity with them, can be adversely bound by the first judgment. *Id.* § 14.13, at 683. To bind a non-party would deny that person a day in court on the disputed issue in violation of due process. *See generally* Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 49 (1995) (reviewing traditional formulations of requirements for collateral estoppel).

The specific requirements of issue preclusion are complex and vary from jurisdiction to jurisdiction. For example, some jurisdictions still require mutuality of parties (so that a non-party to prior litigation may not preclude the loser from relitigating an issue determined against it). Mississippi does not require mutuality. *See* Jordan v. McKenna, 573 So. 2d 1371, 1375 (Miss. 1991) (holding defendant convicted of rape collaterally estopped from relitigating facts in subsequent tort action); McCoy v. Colonial Baking Co., 572 So. 2d 850, 854 (Miss. 1990) (affirming dismissal of husband's loss of consortium claim after judgment for defendant in wife's personal injury action).

[64] *Cf. Jordan*, 573 So. 2d at 1375 ("In a sense, collateral estoppel functions as though it were a rule of evidence. [Citation omitted.] The party in whose favor the fact was found in the first action is said to enter the second trial with that fact established in his favor."). It would be more accurate to say that the party

this Article proposes that the collateral estoppel or issue-preclusive effect of foreign judgments should be determined by Mississippi forum law when there is a difference between the collateral estoppel rules of the rendering state and Mississippi.[65]

Although some scholars have asserted that all preclusive effects of a foreign judgment, including its evidentiary effect in other jurisdictions, must be determined by the law of the rendering jurisdiction,[66] the authority for this assertion is

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against whom a fact was previously determined is prevented from relitigating the fact.

[65] "So long as applicable preclusion law is the same in both systems, the question is academic." GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 114, at 490 (2d ed. 1994). *See generally* Paul D. Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 385 (1963) (arguing that forum may apply its collateral estoppel law to effect of foreign judgment); Gregory S. Getschow, Comment, *If at First You Do Succeed: Recognition of State Preclusive Laws in Subsequent Multistate Actions*, 35 VILL. L. REV. 253, 255 (1990); Jeffrey E. Lewis, *Mutuality in Conflict—Flexibility and Full Faith and Credit*, 23 DRAKE L. REV. 364, 367 (1974). *But see* CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 4468 (1981) (discussing obligation of state courts to honor federal judgments).

[66] "[F]ederal full faith and credit law severely restricts the court's freedom to disregard the preclusion law of the place rendering the judgment. This appears to be true whether the effect sought from the judgment is claim or issue preclusion." SHREVE & RAVEN-HANSEN, *supra* note 65, § 114, at 490.

"With respect to preclusion under the law of the court of rendition, the broad reach of the policy is illustrated by the U.S. Supreme Court's holding that the principles of res judicata extend to *all* issues, including the first court's determination of its jurisdiction over the subject matter and over the parties." SCOLES & HAY, *supra* note 15, § 24.2, at 955.

For general discussions of problems of issue-preclusive effects of judgments in other jurisdictions, see RICHMAN & REYNOLDS, *supra* note 15, § 107 [c], 318-22; Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59 (1982); Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625 (1985); Robert C. Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981); Sanford N. Caust-Ellenbogen, *False Conflicts and Interstate Preclusion: Moving Beyond a Wooden Reading of the Full Faith and Credit Statute*, 58 FORDHAM L. REV. 593 (1990); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289 (1993); Jean A. Mortland, *Interstate Federalism: Effect of Full Faith and Credit to Judgments*, 16 U. DAYTON L. REV. 47 (1990); Gene R. Shreve, *Judgments from a Choice-of-Law Perspective*, 40 AM. J. COMP. L. 985 (1992); Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209 (1986).

weak.[67] In full faith and credit cases, the Supreme Court has unambiguously held only that parties are precluded from relitigating jurisdictional defenses that the foreign state rejected in the process of entering judgment on claims between the parties.[68] The Court's rationale for doing so relied on the need to avoid erosion of the *claim preclusive* effect of judgments on parties to prior litigation.[69]

Accordingly, Mississippi state courts are free to apply forum rules of collateral estoppel and have done so to preclude relitigation of issues that were fully determined in foreign litigation even when the foreign jurisdiction would permit relitigation.[70] Mississippi courts may not, of course, give effect to an invalid foreign judgment.[71]

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[67] Shreve and Raven-Hansen refer only to federal cases enforcing state judgments. SHREVE & RAVEN-HANSEN, *supra* note 65, § 114, at 490 n.8. But these cases are governed by different legal rules. *See infra* note 72 and accompanying text. Scoles & Hay cite only to *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931) and *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939). SCOLES & HAY, *supra* note 15, § 24.2, at 955 n.9. But both those cases limited collateral attacks on the *claim preclusive* effect of judgments by parties who had appeared and actually litigated in the prior litigation. *Baldwin*, 283 U.S. at 525-26 ("We see no reason why this doctrine [res judicata] should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.") *Treinies* held that, when there are inconsistent judgments entitled to claim preclusive effect, the most recent judgment is binding under the Full Faith and Credit Clause. *See supra* note 48.

[68] Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706 (1982) (permitting no collateral attack on first state's subject matter jurisdiction when defendant appeared and litigated issue in first state); Durfee v. Duke, 375 U.S. 106, 116 (1963) (permitting no collateral attack on first state's subject matter jurisdiction when defendant appeared and litigated issue in first state); *Treines*, 308 U.S. at 78 (holding that most recent valid state judgment is binding under Full Faith and Credit Clause notwithstanding prior inconsistent judgments); *Baldwin*, 283 U.S. at 525-26 (permitting no collateral attack on first court's personal jurisdiction when defendant appeared and litigated issue in first forum).

[69] The Court went out of its way in *Durfee v. Duke* to emphasize that the decision did not bind any other party or determine any issues other than those presented in the original quiet title action. *Durfee*, 375 U.S. at 115.

[70] In *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 73, 191 So. 94, 96 (Miss. 1939), after actual litigation of the claims, a Louisiana court with limited jurisdiction over the property entered judgment for the creditor, foreclosing a chattel mortgage. The creditor subsequently commenced proceedings

The practice is different in federal courts. Federal courts do not apply Mississippi's law to the issue-preclusive effect of a foreign judgment. Consistent with this Article's suggestion that the issue-preclusive effect of foreign judgments is a matter of evidence or procedure, federal courts apply their own federal rules, deferring to the law of the rendering state rather than to the law of the state in which they sit. Thus federal courts will not give a state judgment greater preclusive effect than the state rendering it.[72]

D. *Statutes of Limitations Applicable to Foreign Judgments*

The Full Faith and Credit Clause does not require Mississippi to enforce a foreign judgment for as long as the state that entered it, and Mississippi may apply its own statutes of limitations to foreign judgments,[73] just as it may to foreign claims

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in Mississippi against the debtor for the amount of the debt that remained unsatisfied. *Harnischfeger Sales Corp.*, 191 So. at 96. The debtor again raised defenses, but the Mississippi Supreme Court held that relitigation of those defenses was precluded by the prior litigation in Louisiana, even though Louisiana itself limited the effect of its judgment to the foreclosure of the chattel mortgage and would have permitted relitigation of substantive defenses in the action in personam against the debtor. *Id.* at 99.

This comports with the result of more recent cases that permit a state to give another state's judgment greater issue-preclusive effect than the first state. *See, e.g.,* Hart v. American Airlines, Inc., 304 N.Y.S.2d 810, 813 (N.Y. Sup. Ct. 1969) (permitting New York resident to use Texas judgment against defendant in related case to preclude defendant's relitigation of its liability, even though Texas would not permit plaintiff to employ collateral estoppel because Texas required mutuality of parties).

[71] *Cf.* Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (reversing death sentence supported in part by aggravating circumstance of prior New York state felony conviction that had been reversed).

[72] Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 380, 384 (1985) (holding that preclusive effect of prior state judgment in subsequent antitrust litigation is determined by law of state entering judgment); McDonald v. City of W. Branch, 466 U.S. 284, 287, 292 (1984) (holding that federal courts are required to give same preclusive effect to state judgments as state entering judgment but not applying rule to arbitration award); Migra v. Warren City Sch. Dist., 465 U.S. 75, 83 (1984) (holding that preclusive effect of prior state litigation on subsequent federal civil rights claims in federal court is determined by law of state entering judgment).

[73] M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327-28 (1839), *cited with ap-*

that have not been reduced to judgment.[74] But when a foreign judgment is revived in another jurisdiction and the effect of the revival is to create a new judgment, Mississippi must calculate the time for purposes of its statute of limitations from the date of revival.[75] So, too, the limitations period applicable to a second judgment entered on a foreign judgment runs from the entry of the second judgment.[76]

Actions to enforce foreign judgments must be brought within seven years of the entry of judgment[77]—the same time for actions on Mississippi state court judgments.[78] But the period for bringing claims on foreign judgments is reduced to three years when the judgment debtor was a Mississippi resident at the time of the original action.[79] An older case upheld this statutory protection of Mississippi defendants against a Full Faith and Credit Clause challenge,[80] but this discrimination in

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proval in Sun Oil Co. v. Wortman, 486 U.S. 717, 717 (1988); Union Nat'l Bank v. Lamb, 337 U.S. 38, 42 (1949).

[74] *See infra* notes 84-101 and accompanying text.

[75] *Union Nat'l Bank*, 337 U.S. at 44 (holding that Missouri was free to apply its own statute to Colorado judgment but must apply it to date judgment was revived in Colorado when effect of revival in Colorado was to establish new valid judgment).

[76] In *Roche v. McDonald*, 275 U.S. 449, 450 (1928), the plaintiff brought suit on a Washington judgment in Oregon after the limitations period for enforcing the original Washington judgment had expired. Washington refused to recognize the Oregon judgment, but the Court reversed, holding that the Oregon judgment must be accorded full faith and credit. *Roche*, 275 U.S. at 455.

[77] *See* MISS. CODE ANN. § 15-1-45 (1972) ("All actions founded on any judgment or decree rendered by any court of record without this state shall be brought within seven years after the rendition of such judgment or decree, and not after.").

[78] *Id.* § 15-1-43 (providing seven years to bring actions founded on "any judgment or decree rendered by any court of record in this state . . . . ").

[79] *Id.* § 15-1-45 ("However, if the person against whom such judgment or decree was or shall be rendered, was, or shall be at the time of the institution of the action, a resident of this state, such action, founded on such judgment or decree, shall be commenced within three years next after the rendition thereof, and not after."). Gray v. Valley, 101 So. 855, 856 (Miss. 1924) (holding that three-year period applied to judgment debtor who resided in Mississippi at time of action in which judgment was rendered); Marx v. Logue, 15 So. 890, 891 (Miss. 1894) (holding that plea of three years must aver that defendant was resident of Mississippi at time suit was instituted).

[80] In *Bosich v. Skermetti*, 112 So. 385, 385 (Miss. 1927), the plaintiff de-

favor of Mississippi judgment debtors may not survive constitutional challenges under the Mississippi state constitutional guaranty of equal access to judicial remedy,[81] or under the Equal Protection[82] and Privileges and Immunities Clauses.[83]

II. STATUTES OF LIMITATIONS APPLICABLE TO FOREIGN CAUSES OF ACTION

The Mississippi Supreme Court has steadfastly followed the traditional doctrine that most statutes of limitations are procedural and that Mississippi forum law, therefore, determines whether claims are time barred.[84] This has provoked

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murred to a three-year limitation defense raised by a Mississippi resident on the ground that the shorter limitation period violated the Full Faith and Credit Clause. The plaintiff did not raise equal protection or privileges and immunities issues. *Bosich*, 112 So. at 385. The Court upheld the statute against the full faith and credit challenge, finding that the limitation period was reasonable, in part because it assumed that many states tolled claims against non-residents so that "the claim would never be barred in California . . . . " *Id. See also* Watkins v. Conway, 385 U.S. 188, 191 (1966) (rejecting claim that shorter limitation period for foreign judgments violated equal protection "in a scheme that relies upon the judgment State's view of the validity of its own judgments" but not considering problem of longer period for state resident).

[81] MISS. CONST. art. III, § 24 ("All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."). *See* Miles v. Board of Supervisors, 33 So. 2d 810, 814 (Miss. 1948) (construing the requirement that "all courts shall be open" to mean the court must "afford equal access to all."). Shorter statutes of limitations are not unconstitutional when they are based on different kinds of causes of action. *See* Fluor Corp. v. Cook, 551 So. 2d 897, 900 (Miss. 1989) (holding that shorter limitations period for personal injury other than wrongful death did not violate state constitutional guaranty of access to remedy); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320, 324 (Miss. 1981) (holding that ten-year limitations period was not unconstitutional), Cameron v. Louisville, N.O. & T. Ry. Co., 10 So. 554, 555 (Miss. 1891) (holding that one-year limitation period was not unconstitutional). But the issues addressed by these cases are different from the problem posed by section 15-1-45, which denies access based solely on the status of the defendant at the time of the original judgment.

[82] *See infra* part VI(B)(1).

[83] *See infra* part VI(B)(2).

[84] The traditional rules called for the forum to apply its statute of limitations to foreign claims whether the forum's statute was longer or shorter, RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 603, 604 (1934). They were retained by the original version of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142

much criticism because it means that Mississippi's limitations periods would apply to claims that have nothing to do with the state and that were time barred under the law of the place where the claims arose.[85] For many years Mississippi's general

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(1971). *See generally* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 576, at 962 (3d ed. 1846) ("In regard to statues of limitation or prescription of suits, and lapse of time, there is no doubt, that they are strictly questions affecting the remedy, and not questions upon the merits . . . . And there can be no just reason, and no sound policy, in allowing higher or more extensive privileges to foreigners, than are allowed to subjects.").

Under modern choice-of-law theories, some other jurisdictions began to treat statutes of limitations as substantive, *e.g.*, Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 486 (9th Cir. 1987) (holding under California's interest analysis conflict-of-laws law that longer foreign limitations period applied). Scholars also questioned the traditional approach. *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 90 at 264 ("No good reason exists for the procedural characterization of limitations issues."); Margaret Grossman, *Statutes of Limitations and Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1, 64 ("Despite the established tradition of treating statutes of limitations as procedural issues controlled by forum law, it has become evident that such treatment is not always appropriate."). The Uniform Conflict of Laws Limitations Act (adopted by five states) treats statutes of limitations as substantive. 12 U.L.A. § 2(a), at 158 (1995):

> Except as provided by Section 4 [unfairness], if a claim is substantively based:
>
> (1) upon the law of one other state, the limitation period of that state applies; or
>
> (2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this State applies.

Revisions to the Second Restatement provide exceptions to applying forum limitations law when applying forum law is unreasonable or when there is no significant forum interest and the claim is barred by the law of the state having a more significant relationship to the parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971) (amended 1988).

[85] *See, e.g.*, Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 570 (Miss. 1988) (Robertson, J., dissenting) (criticizing Mississippi's treatment of statute of limitations problems); White v. Malone Properties, Inc., 494 So. 2d 576, 581-82 (Miss. 1986) (Robertson, J., concurring). *See generally* Dinetia M. Newman, Comment, *Mississippi's Statutes of Limitations and Choice of Law Analysis: A Borrowed Conflict*, 57 MISS. L.J. 739, 767 (1987) ("With criticism abounding and foreign plaintiffs seeking jurisdiction, the Mississippi Supreme Court no longer should refrain from addressing the issue. The time has come for Mississippi to abandon its traditional treatment of statutes of limitation as procedural.").

limitations period was much longer than those of adjacent states, and much litigation that was time barred elsewhere was attracted to Mississippi courts.

Despite criticism, the Mississippi Supreme Court adhered to the doctrine that statutes of limitations are procedural.[86] Today, problems of forum shopping have been reduced significantly by the adoption of a borrowing statute by the Mississippi legislature.[87]

Even before the adoption of the borrowing statute, courts recognized two exceptions to the general rule that statutes of limitations are procedural: 1) where the foreign limitations period is "built in" to the cause of action or contained in legislation creating the cause of action so that its expiration is construed to extinguish the right as well as the remedy,[88] and 2)

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[86] *Shewbrooks*, 529 So. 2d at 570; Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975); *see also* Kershaw v. Sterling Drug, Inc., 415 F.2d 1009, 1011 (5th Cir. 1969) ("[I]t appears that Mississippi follows the traditional rule that statutes of limitations are 'procedural' rather than 'substantive' . . . .).

[87] *See infra* notes 91 and 92.

[88] Bethlehem Steel Co. v. Payne, 183 So. 2d 912, 916 (Miss 1966) (holding Louisiana workers' compensation claim barred by Louisiana statute of limitations):

> There are a number of well recognized exceptions to the general rule that statutory limitations upon the time within which suit must be brought are procedural. The following exception to the rule is noted in STUMBERG, CONFLICT OF LAWS, 148 (3rd ed., 1963):
>
> > Another exception which is frequently made in the decisions exists where a statute which creates a right, in the same enactment provides for the time within which suit is to be brought. In such cases a majority of the courts have taken the position that the limitation qualifies the right so that unless suit is brought within the time allowed under the foreign statute, no suit may be brought at the forum, even though the time there may be longer.

Accord Louisville & N.R. Co. v. Dixon, 150 So. 811, 812 (Miss. 1933):

> [W]here a statute creates a right of action which did not exist under the common law and the same statute fixes the time within which action or proceedings to enforce the same may be begun, the time so fixed is not a mere statute of limitations, but is an integral part of the right thus created, is a substantive condition, so that, after the time fixed in the statute, the right to institute an action thereunder becomes extinct, not only in the state which created the right, but everywhere else.

See also Price v. Litton Sys., Inc., 784 F.2d 600, 602 (5th Cir. 1986) (holding under Mississippi law that Alabama statute of limitations governed wrongful death action where the limitation extinguishes substantive rights under the law of the place where the claims arose.[89] In these two cases, a foreign substantive statute of limitations would apply to claims that arose in the foreign jurisdiction. But because Mississippi has abandoned rigid territorial choice-of-law rules in other contexts, the court today might be persuaded in chosing among conflicting substantive statutes of limitations to adopt the law of the state with the most significant relationship to

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arising in Alabama); Ramsay v. Boeing Co., 432 F.2d 592, 597 (5th Cir. 1970) (holding under Mississippi law that foreign limitation period applied in wrongful death action arising in Belgium because foreign limitations period was condition of existence of right of action rather than merely limitation of remedy); Fieldman v. Roper Corp., 586 F. Supp. 936, 938 (N.D. Miss. 1984) (applying Mississippi statute of limitations but discussing exception "when statute creates a right of action and simultaneously provides for a time within which a suit must be brought."). *See generally White*, 494 So. 2d at 581-82 (1986) (Robertson, J., concurring) (discussing and criticizing distinctions between statutes that bar right and remedy); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 605 (1934) ("If by the law of the state which has created the right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state."); RICHMAN & REYNOLDS, *supra* note 15, § 90[b] at 765-66; SCOLES & HAY, *supra* note 15, § 3.10, at 60; STORY, *supra* note 84, § 582, at 975; David Watkins Mockbee, Note, *Conflict of Laws—Statutes of Limitations—Substantive Foreign Statute Covering at Time of Discovery Governs*, 44 MISS. L.J. 276, 279 (1973) (discussing Mississippi cases); Newman, *supra* note 86, at 745 n.30.

[89] Examples include statutes of repose that terminate substantive rights as well as limitations periods that are construed as a matter of law to terminate rights, such as the doctrines of adverse possession or title by prescription. Walls v. General Motors, Inc., 906 F.2d 143, 146 (5th Cir. 1990) ("The courts of Oregon . . . hold its statute of repose to be substantive, so Mississippi is bound to apply it."); Perkins v. Guy, 55 Miss. 153, 177 (1877); Hamilton v. Cooper, 1 Miss. 542 (1832) (holding in action on detinue for possession of slaves arising under laws of another state that foreign limitations period barred action when it extinguished legal right as well as remedy). *See generally* STORY, *supra* note 84, § 582, at 972 (maintaining that expiration of statute of limitations where property was held adversely bars subsequent litigation in forum with longer statute of limitations to which property is removed).

It has been suggested that a shorter foreign limitations period for enforcing a judgment will be adopted by the forum as substantive, SCOLES & HAY, *supra* note 15, § 24.32, at 995, but that seems to rely on more recent authority that may not be persuasive. *Id.* at n.4 (citing to RESTATEMENT (SECOND) CONFLICT OF LAWS 118(2) (1971)).

the parties and occurrence.[90]

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[90] It is possible that Mississippi will retain a traditional territorial test and apply the substantive statute of limitations from the place of the wrong, *cf.* MISS. CODE ANN. § 15-1-65 (1995) (borrowing statute borrows limitations period of place where "cause of action accrued"). It is also possible that Mississippi will resolve conflicts involving statutes of limitations characterized as substantive under the more recent balancing rules adopted for resolving other substantive conflicts. The new approach is discussed *infra* part IV(B).

One federal court has applied Mississippi's modern choice-of-law rules for substantive conflicts to a case involving a foreign substantive limitations period, though the result would have been the same if territorial rules had governed. *See* Allison v. ITE Imperial Corp., 928 F.2d 137, 145 (5th Cir. 1991) (opinion by Barksdale, J.) (holding that Tennessee's statute of repose barred claims for injuries sustained by Mississippi employee working temporarily in Tennessee by allegedly defective electrical component of equipment). Four aspects of the decision are troubling. First, the court did not consider the possibility that Mississippi would apply a traditional territorial rule for limitations issues. Second, it did not address the possible application of the Mississippi statute mandating application of Mississippi law to limitations of remedies for breaches of implied warranties or merchantability and fitness, MISS. CODE ANN. § 75-1-105 (1972). Third, though the court plausibly assumed that choice-of-law rules of the Restatement Second should apply and looked at specific rules for torts, *Allison*, 928 F.2d at 139-44, the court ignored the fact that these rules do not apply to limitations issues. Under the most recent version of the Restatement, a forum's statute of limitations applies when the forum has a substantial interest. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(2)(a) (1971) (amended 1988). The older version of the Restatement contained a provision restating the traditional rule that an action will be time barred "if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy." *Id.* § 143, *deleted by* 1988 amendments. It did not, however, explain what the "otherwise applicable law" would be. Fourth, the court decided the case by applying the presumption that the law of the place of the wrong should apply unless some other state had a more significant relationship. *Allison*, 928 F.2d at 144. Under the Restatement's limitations rules, however, forum law presumptively applies unless barred by the law of a state with a more significant relationship *and* the forum has no substantial interest. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(2)(b) (1972) (amended 1988).

See also Jackson v. National Semi-Conductor Data Checkers/DTS, Inc., 660 F. Supp. 65 (S.D. Miss. 1986), which ultimately held that a breach of warranty claim was time-barred under Mississippi law but only after concluding that Alabama was the state with the most significant contacts yet that its law should not apply because it characterized it as procedural, suggesting that the Alabama statute would apply if substantive. *Jackson*, 660 F. Supp. at 70, 71 n.7. The court's analysis proceeded from the erroneous assumption that the constitutional limits on the application of the Mississippi statute mandating application of Mississippi law (including its limitations period) required a consideration of choice-of-law contracts. *Id.* at 70. It did not. Mississippi's application of its longer statute of

Apart from these exceptions, statutes of limitations are procedural, and to avoid attracting foreign plaintiffs seeking the boon of Mississippi's longer limitations period, Mississippi enacted a borrowing statute.[91] The statute applies the foreign statute of limitations when the foreign limitations period is shorter[92] and the cause of action accrued outside Mississippi. As a legislative compromise, the statute provides that Mississippi residents still get the benefit of the longer Mississippi statute of limitations on most causes of action that accrue out of state.[93]

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limitations was constitutional. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988), discussed *infra* notes 423-27.

[91] MISS. CODE ANN. § 15-1-65 (1995):

> When a cause of action has accrued outside of this state, and by the laws of the place outside this state where such cause of action accrued, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state; provided, however, that where such a cause of action has accrued in favor of a resident of this state, this state's law on the period of limitation shall apply.

The effective date of the statute is July 1, 1989. *See generally* JACKSON, *supra* note 93, § 4:29; Jeffrey Jackson, *Legislative Reform of Statutes of Limitations in Mississippi: Proposed Interpretations, Possible Problems*, 9 MISS. C. L. REV. 231, 291 (1989). The statute has been codified as a successor to a previous statute that had been adopted in 1880 but that had been deprived of much effect because it was limited to nonresidents who moved to Mississippi after the statute had run on the cause in another state. *See* Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 568-74 (Robertson, J., dissenting); *see generally*, Jackson, *supra*, at 270-79; Newman, *supra* note 85, at 753-57. Researchers should be forewarned that the annotations in the Mississippi Code erroneously include the cases construing the predecessor statute (which are inapplicable to the present statute).

[92] When the foreign limitations period is longer, the borrowing statute does not apply, but Mississippi, which still characterizes most statutes of limitations as procedural, will apply its own shorter statute of limitations to bar the claim. In those cases where the foreign statute of limitations is deemed substantive, however, Mississippi may arguably be required to apply the longer foreign substantive limitations period.

[93] There is no official legislative history in Mississippi, but the historical context of the enactment of the borrowing statute makes it clear that its purpose was to stop foreign forum shoppers commencing actions in Mississippi that had nothing to do with the state. To this same end, the legislature also cut the time period of the catchall statute of limitations in half. MISS. CODE ANN. § 15-1-49 (1995).

Understanding the purpose of the borrowing statute is important for interpreting it. The clause providing Mississippi residents the benefit of a longer Mis-

Although it is easy to apply in most cases, the borrowing statute raises a few questions that have not yet been authoritatively answered. First, there can be questions about where a cause of action accrued.[94] Two closely related claims for personal injury or death based on negligence and breach of warranty for a defective product may accrue in different states and be governed by different statutes of limitations.[95] Second,

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sissippi limitations period was intended only to preserve for residents the prior practice, under which the forum limitations period was applied when procedural. It was never intended to extend the time for bringing an action which was barred by a foreign substantive statute of limitations.

[94] This problem is confronted in applying many borrowing statutes. It can be difficult to localize the place where a certain cause of action accrued or arose. A tort case may premise liability on omissions (that occurred everywhere for extended periods of time) or on continuing wrongful acts, *e.g.*, Duke v. Housen, 589 P.2d 334, 338 (Wyo. 1979) (continuous tortious acts and failures to warn during cross-country car trip). Moreover, the location of a claim may depend on its legal characterization. *Cf.* Lumbermens Mut. Cas. Co. v. August, 530 So. 2d 293 (Fla. 1988) (holding that cause of action for uninsured motorist coverage arose where insurance contract was entered into).

These difficulties may be aggravated by newer choice-of-law approaches under which the substantive law that applies may differ from the place of the wrong that traditionally established the place where the cause of action accrued. *See* Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975) (opining that place of accrual can be different from place whose law applies to tort). For example, under Mississippi's choice-of-law rules, a plaintiff injured in Tennessee may have a cause of action that is not recognized under the law of Tennessee. In such a case, it might be argued that the place where the cause of action accrued should be Mississippi, the place under the substantive law of which the party acquired a cause of action. *See generally* JACKSON, *supra* note 3, § 4:30 ("There are two ways to interpret the borrowing statute's language on accrual. One is to use the territorial approach of the First Restatement. That territorial approach is circular and conclusory, and was repudiated by the Mississippi Supreme Court . . . . The second method is to . . . [use] the law of the state with the most significant relationship to the parties, event, occurrences or transaction.").

[95] *See* Suarez v. Ford Motor Co., No. 93-CA-00970 COA (Ct. App. Miss. June 27, 1995) (not designated for publication and may not be cited pursuant to Miss. R. App. P. 35-B) (holding in case arising from accident in Georgia involving Georgia resident who purchased car in Mississippi that negligence claim accrued in Georgia and was barred by Georgia statute of limitations but breach of warranty claim accrued in Mississippi and was not yet barred by longer Mississippi statute of limitations). *See also* Crouch v. General Elec. Co., 699 F. Supp. 585, 590 (S.D. Miss. 1988) (applying Mississippi choice-of-law to determine tort claims governed by law of place of accident, North Carolina, but breach of warranty claims governed by law of place of delivery of product, Massachusetts).

there are problems presented by the special treatment accorded Mississippi residents. The statute's language is ambiguous about the time at which a plaintiff needs to be a Mississippi resident.[96] Recognizing residency acquired after a cause of action accrued may encourage forum shopping and seems to conflict with the court's refusal to consider after-acquired domicile in choice-of-law determinations.[97] On the other hand, permitting after-acquired domicile might be supported by arguments that the legislature intended to benefit all Mississippi residents and that a remedial law should be liberally construed. Recognizing after-acquired domicile might even find some support under the strange version of the predecessor of the borrowing statute.[98]

The borrowing statute's preferential treatment of Mississippi residents may also raise Equal Protection or Privileges and Immunities Clause problems.[99] A comparable constitution-

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[96] MISS. CODE ANN. 15-1-65 (1995).

[97] Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1036 (Miss. 1985) (refusing to consider residency acquired after cause of action but before commencement of action).

[98] The predecessor statute was construed to borrow a foreign cause of action *only* in cases in which a defendant moved to the state after the accrual of the cause of action. *E.g.*, Louisville & Miss. R.R. Transfer Co. v. Long, 131 So. 84, 88 (Miss. 1930), *superseded by* MISS. CODE ANN. § 15-1-65 (1995).

[99] *See generally infra* Part VI(B). The borrowing statute's distinction between residents and nonresidents may more readily survive constitutional challenge than the different limitations periods for enforcing foreign judgments against residents and nonresidents, *see supra* notes 81-83 and accompanying text. First, there is older authority upholding a similar statute against a privileges and immunities challenge. *See* Canadian N. Ry. v. Eggen, 252 U.S. 553, 563 (1920) (holding discrimination against nonresidents was not matter of great importance so as to raise privileges and immunities issue as long as nonresident had reasonable time to bring suit). *Cf.* Watkins v. Conway, 385 U.S. 188, 191 (1966) (rejecting claim that shorter limitation period for foreign judgments violated equal protection "in a scheme that relies upon the judgment State's view of the validity of its own judgments" but not considering problem of longer period for state resident).

Second, this statute may satisfy the equal protection test. Discouraging forum shopping by out-of-state plaintiffs for claims that accrued out of state may be a legitimate state purpose, or it may be a reasonable means of achieving underlying legitimate purposes such as conserving judicial resources, discouraging litigation of stale claims, and deterring the litigation in Mississippi of claims that have little to do with the state. This justification for the distinction assumes, however, that Mississippi has more interest in its own residents and that its laws favoring al problem with the Mississippi statute that tolls the running of statutes of limitations during a nonresident's absence from the state[100] has been avoided by judicial construction limiting it to cases where defendants are unamenable to service under the long-arm statute or other means.[101]

III. PROVING FOREIGN LAW

Proving the content of foreign law in Mississippi state courts is no different from proving Mississippi law.[102] There are no special pleading requirements, and foreign law may be brought up before the trial court at any time by the parties or

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them are permitted. *But see* John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 186-87 (1981).

[100] MISS. CODE ANN. § 15-1-63 (1995):

> If, after any cause of action has accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as part of the time limited for the commencement of the action, after he shall return.

[101] Sullivan v. Trustmark Nat'l Bank, 653 So. 2d 930, 931 (Miss. 1995).

[102] MISS. CODE ANN. § 13-1-149 (1972):

> When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state.

Id. See generally Parker v. McCaskey Register Co., 171 So. 337, 338 (Miss. 1936) (taking notice that Ohio statute provided notary publics with power to administer oaths and certify). The statute was read narrowly to hold that courts will not take judicial notice of town ordinances. Naul v. State, 12 So. 903, 903 (Miss. 1893). But this may have reflected an older view of judicial notice under which Mississippi courts declined to take judicial notice of town ordinances even in Mississippi, state administrative regulations, and their own trial proceedings in other unrelated cases. Although there has been a trend towards greater recognition of matters that are recorded in accessible public record, there is reason to doubt whether this will extend to certain ordinances or administrative proceedings. As CAROLYN ELLIS STATON, MISSISSIPPI EVIDENCE § 201, at 30 (3d ed. 1995), explains, "Mississippi case law follows the majority view in refusing to take judicial notice of municipal and local ordinances; unlike the laws of sister and foreign jurisdictions, local and municipal ordinances are often difficult to locate or verify."

even by the court itself.[103] The Mississippi Supreme Court has been generous in allowing questions of foreign law to be raised for the first time on appeal.[104] On appeal, foreign law is also treated like Mississippi law and subjected to de novo review.[105]

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[103] MISS. R. EVID. 201:

> (c) *When Discretionary.* A court may take judicial notice, whether requested or not.
>
> (d) *When Mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) *Opportunity to Be Heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> (f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.

The rules further provide that a civil jury be instructed to accept as conclusive any fact judicially noticed. *Id.* § 201(g). This rule departed from pre-rule state practice where the subject of judicial notice was not conclusive. *See id.* § 201(g) cmt. In a typical conflict-of-laws case, however, the jury would not be asked to consider the foreign law as a conclusive "fact." Rather the foreign law would provide the content of instructions on the claims or defenses at issue in the case.

[104] In *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 455 (Miss. 1983), plaintiffs brought actions for fraud and breach of fiduciary duties arising from alleged joint ventures to operate oil and gas leases in Louisiana. The defendants demurred on the ground that Mississippi lacked subject matter jurisdiction. *Serio*, 431 So. 2d at 456. Since the action was in personam, seeking relief in the form of damages and specific performance, the chancellor clearly had subject matter jurisdiction. *Id.* at 458.

But the supreme court went out of its way to suggest that the real issue the defendant should have raised was a question of choice of law. *Id.* at 458. Although this issue was raised neither before the trial court nor on appeal, and although the supreme court was unable to resolve the issue because of the absence of an evidentiary record, the court nevertheless proceeded to discuss the proper method for deciding choice-of-law issues and suggested that Louisiana law might apply. *Id.*

The court did advise, however, that because of the fact-specific character of its choice-of-law approach, "it is obvious that a choice of law question may hardly, if ever, be appropriately resolved by this Court on demurrer." *Id.*

[105] *See infra* note 115, discussing Justice Robertson's practice in Kountouris v. Varvaris, 476 So. 2d 599 (Miss. 1985). *See also* Estate of Lawrence Thomas Jefferson, No. 95-CA-00226 COA (Ct. App. Miss. Jan. 30, 1996) (not designated for publication and may not be cited pursuant to Miss. R. App. P. 35-B) (making de novo determination of applicable law when chancellor wrongly applied most significant relationship test and wrongly determined that usury violated Mississippi

Federal court practice is similar; however, a party must give written notice of an intent to raise an issue concerning the law of a foreign *country* either in the pleadings or in some other written form. The court may consider any source, and its determination is reviewable as a question of law.[106] Federal appellate courts apply a similar standard in reviewing federal trial court determinations of state law, including the law of the state in which they are sitting.[107]

Such practices facilitate proof of foreign law by informal but reliable sources. In addition, parties may introduce proof under rules of evidence, including opinion testimony of a properly qualified expert witness.[108]

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public policy). *But see* Browning v. Shackelford, 196 So. 2d 365, 373-74 (Miss. 1967) (Ethridge, C.J., specially concurring) (basing holding on theory of lex loci because parties tried case and argued appeal on theory that foreign law applied).

[106] FED. R. CIV. P. 44.1:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

See FED. R. CIV. P. 44.1 advisory committee's notes ("Under the *third sentence*, the court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact,' so that appellate review will not be narrowly confined by the 'clearly erroneous' standard . . . . ").

[107] The Fifth Circuit has observed that "we 'review de novo a district court's determination of state law.'" Allison v. ITE Imperial Corp., 928 F.2d 137, 139 (5th Cir. 1991) (*quoting* Salve Regina College v. Russell, 499 U.S. 225, 231 (1991)). *Accord* Gann v. Fruehauf Corp., 52 F.3d 1320, 1324 (5th Cir. 1995). *Salve Regina College* repudiated the prior Fifth Circuit practice of deferring to the district court's construction of state law. The choice-of-law issue was properly preserved for appellate review when a party referred to choice of law in its submissions to the trial court, objected to application of forum law, and requested a jury instruction stating the rule that applied under foreign law. Cottingham v. General Motors Corp., 119 F.3d 373, 377 (1977).

[108] *See* MISS. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); FED. R. EVID. 702 (same language). The Mississippi Supreme Court has implied in at least one case that such expert testimony was necessary. Estate of Varvaris, 528 So. 2d 800, 803 (Miss. 1988) (observing specifically that absence of

When Mississippi law is unsettled, the United States Supreme Court and any United States Court of Appeals may certify questions to the Mississippi Supreme Court for an authoritative written construction of Mississippi law.[109] Most other states have similar rules that allow questions to be certified by federal courts.[110]

In cases where there is no adequate proof of foreign law in the record, jurisdictions are divided over the appropriate judicial response. There are three possibilities: 1) the court may apply forum law (an approach supported by the traditional presumption that foreign common law is identical to forum law in the absence of proof to the contrary);[111] 2) the court may

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expert opinion prior to concluding record was insufficient for court to find content of Greek law).

[109] MISS. R. APP. P. 20(a):

> When it shall appear to the Supreme Court of the United States or to any United States Court of Appeals that there may be involved in any proceeding before it questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court for rendition of a written opinion concerning such questions or propositions of Mississippi law. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

See Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1030-31 (Miss. 1985) (discussing juristic problems presented by predecessor of this rule), *answer conformed to*, 768 F.2d 718 (5th Cir. 1985).

[110] Twenty-nine states, the District of Columbia, and Puerto Rico have adopted the Uniform Certification of Questions of Law Act in some form. The utility of the procedure is limited in that it is cumbersome and is discretionary both in the certifying court and in the court from which a response is requested. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT (1967 Act), 12 U.L.A. 81-98. *See generally* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 425 (1988); Ira P. Robbins, *The Uniform Certification of Question of Laws Act: A Proposal for Reform*, 18 J. LEGIS. 127, 183 (1992). A revised version has been proposed. UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] (1995), 12 U.L.A. 67-69 (1996).

[111] *E.g*, Alabama Great S. R.R. Co. v. Carroll, 11 So. 803, 805 (Ala. 1892) ("[The fellow servant doctrine] will be presumed in our courts, as thus declared, to be the common law of Mississippi, unless the evidence shows a different rule to have been announced by the supreme court of that state as being the common law thereof."); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 621 (1934)

dismiss the claim (or bar the defense) on the theory that the party failed in its duty to make out a prima facie case;[112] or 3) the court may make certain reasonable presumptions about foreign law.[113] Although it has never directly addressed the issue,[114] the practice of the Mississippi Supreme Court combines the second two approaches. The court will not refuse to consider foreign law because a party failed to bring it to the trial court's attention,[115] but the party seeking the benefit of

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("[F]oreign law must be alleged in pleading and proved by evidence."); *id.* § 622 ("In the absence of evidence, the common law of another common-law state is presumed to be the same as the common law of the forum."); *id.* § 623 ("There is no presumption that the statutory law of another state is the same as that of the forum.").

[112] *E.g.*, Walton v. Arabian Am. Oil Co. 233 F.2d 541, 544-45 (2d Cir. 1956) (directing verdict in favor of defendant where plaintiff injured in Saudi Arabia failed to offer proof of Saudi law). Professor Reynolds claims that this result could not occur today in light of Federal Rule of Civil Procedure 44.1, which was adopted in 1966. William L. Reynolds, *What Happens When Parties Fail to Prove Foreign Law?*, 48 MERCER L. REV. 775, 775-76 (1997).

[113] *See generally* SCOLES & HAY, *supra* note 15, § 12.19, at 426-29 (discussing judicial approaches where there has been failure of proof with respect to content of foreign law). *E.g.*, Tidewater Oil Co. v. Waller, 302 F.2d 638, 642 (10th Cir. 1962) (affirming tort judgment for plaintiff injured in Turkey in absence of evidence of Turkish law by presuming Turkey provided remedy for injuries inflicted through defendant's fault but not presuming Turkey had adopted comprehensive workers' compensation scheme identical to forum's that barred tort remedy).

[114] Language from *Mitchell v. Craft*, 211 So. 2d 509, 512 (1968), may seem to address the issue and to establish a presumption that forum law applies: "We will assume that a case is to be governed by the law of the forum unless it is expressly shown that a different law applies . . . . [A]nd forum law should presumptively apply unless it appears that non-forum contacts are of greater significance. [Citations omitted.]" But this language occurred in the context of a discussion of choice-of-law rules in a case in which the content of foreign law was fully established; the court thus meant to express a policy preference for forum law rather than a rule of evidence to apply in the absence of proof to the contrary.

[115] It will not even refuse to consider such issues on appeal. *See supra* note 104, discussing *Tideway Oil Programs, Inc.*, 431 So. 2d at 458.

Another case illustrates the practice. Emanuel Varvaris, an elderly Greek immigrant, gave his son-in-law power of attorney and the next month this agent purported to convey Greek real property to the agent's wife, the grantor's daughter. Kountouris v. Varvaris, 476 So. 2d 599, 601 (Miss. 1985). A few months later Varvaris executed a will devising the same property to his son. *Kountouris*, 476 So. 2d at 601. The court held that defects in the acknowledgment and recording of the power of attorney prevented the agent's conveyance from passing a title superior to that of bona fide purchasers for value. *Id.* at 603-04. It held that the foreign law cannot rely on the court's diligence. When the court remains unsatisfied with its ability properly to construe foreign law because of an inadequate record, the court has abstained from deciding issues of foreign law.[116]

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trial court erred in holding that the grant was invalid for all purposes under Mississippi law. *Id.* at 605.

Justice Robertson's opinion did not rely exclusively on Mississippi law in reaching the conclusion that the formal defects did not prevent valid conveyance of the Greek property. Although there was no suggestion that Greek law was presented at trial and the parties even requested that the dispute be decided under Mississippi law, *id.*, Justice Robertson nevertheless insisted that, absent a binding stipulation that Mississippi law governed, *id.*, Mississippi law should not apply to the claims to Greek land unless Mississippi law would apply under Mississippi choice-of-law principles:

> Because the land in issue is outside Mississippi, those rules [Mississippi statutes governing land transfers] have no application except such be mandated by more basic rules of Mississippi law . . . . (citations omitted). Only if the statutes mentioned above would be selected by virtue of our choice of law rules may those statues have anything to do with determining the validity of the conveyance of the [Greek] property or the enforceability of that conveyance as against third parties.

Id. To be sure, this reasoning may be read as pure dictum, since the court reversed because of an error in Mississippi law. Nevertheless, Justice Robertson emphasized that upon remand the trial court was required to decide whether Greek law applied, and his opinion included a long advisory discussion of choice-of-law principles that apply in real property disputes. *Id.* at 605-06. He concluded that the judicial task of determining foreign law (regardless of the evidence of foreign law in the record on appeal) was required:

> [A]lthough we do not decide here that Greek law applies, we do require that the law of Greece on this issue be ascertained. Indeed, it is elementary to any choice of law question that the contents of the law of the two competing jurisdictions be determined. This is for the rather obvious reason of ascertaining *ab initio* whether indeed there is a conflict. [Language of MISS. CODE ANN. § 13-1-149 (1972) omitted.]

Id. at 607.

Notwithstanding the confusing state of the record, Justice Robertson's opinion indicates that in a conflicts case where there is no adequate evidence of the content of foreign law, neither the trial court nor the appellate court should automatically apply Mississippi law.

[116] The chancellor ultimately upheld the conveyance pursuant to the power of attorney and held that the will was invalid because of undue influence. *In re* Estate of Varvaris, 528 So. 2d 800, 802 (Miss. 1988). Although the Chancellor's decision rested exclusively on Mississippi law, *id.* at 803, the Supreme Court affirmed, *id.* at 804. In argument before the Supreme Court, the court requested the parties supply it with Greek law. *Id.* at 803. But after studying the Greek

IV. CHOICE OF LAW

A. Procedure

Traditionally, even in cases where foreign law governed substantive rights and liabilities, courts would apply their own forum law to matters of procedure and remedy.[117] Although the traditional distinction between substance and procedure has been questioned and abandoned by many states,[118] Mississippi continues to apply Mississippi forum law to issues it deems procedural and remedial.[119]

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legal sources, the court concluded it was unable to determine the effect of Greek law. Accordingly, it deliberately abstained from deciding the Greek legal issues:

> The parties have tendered to us extensive extracts from Greek law. These concern Greek property law, law regarding powers of attorney and laws regarding wills and inheritance. The record is devoid, however, of the testimony of any expert witness regarding Greek law and counsel for the parties before us frankly confess that their expertise in Greek law is less than adequate unto the day.
>
> The Court below decided only the issues tendered under Mississippi law, eschewing any venture into Greek law. We have diligently pursued a study of the Greek law tendered in the hopes that we might do as much as possible to bring this litigation to an end. In the end, discretion counsels that we too stay our hands regarding the Greek law questions. What is before us regarding the content and meaning of Greek law is simply too inadequate to allow us to proceed with confidence. Having resolved affirmatively the Mississippi law issues tendered, we decline to decide the foreign law issues. It's just too Greek for us.

Id. at 803-04 (Robertson, J.).

[117] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934) ("All matters of procedure are governed by the law of the forum."); STORY, *supra* note 84, § 556, at 935 ("It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place, where the action is instituted . . ."). *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 57, at 153-55; SCOLES & HAY, *supra* note 15, § 3.8, at 57; Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 334 (1933).

[118] The Second Restatement explicitly avoids employing the distinction between substance and procedure to decide cases, requiring a consideration of the underlying policies and purposes of the rules in conflict. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, cmt. b. (1971). *See also* RICHMAN & REYNOLDS, *supra* note 15, § 58, at 155; SCOLES & HAY, *supra* note 15, § 3.8, at 58.

[119] Ford v. State Farm Ins. Co., 625 So. 2d 792, 793 (Miss. 1993) ("Mississippi applies its own procedural law to actions filed in the courts of this state."); Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 619 So. 2d 908, 912 (Miss. 1993) ("In

The first task in making a choice-of-law determination is, therefore, to decide whether an issue is procedural and governed by Mississippi law or substantive and governed by the law selected by Mississippi choice-of-law rules.[120] The cases provide guidance.[121] Matters relating directly to rules of pleading,[122] evidence,[123] and remedy are governed by Mississippi law.[124] The award of attorney's fees is remedial and gov-

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sum, if the enforcement of the contract involves a substantive right, then New York law should apply. If enforcement of the contract involves a remedial or procedural right, then Mississippi law should apply."); Interstate Life & Accident Co. v. Pannell, 152 So. 635, 638 (Miss. 1934) ("Under the law, the substantive rights of the parties to this cause are governed by the laws of [Tennessee] and not by the laws of Mississippi . . . . The procedure, however, including the remedies and rules of evidence, is governed by the law of the forum."). Mississippi cases holding statutes of limitations are governed by forum law (absent the borrowing statute), *see infra* cases in note 86, do so on the traditional ground that statutes of limitations are procedural. *See also* Vice v. Department of Human Servs., No. 96-CA-00064-SCT, slip op. (Miss. Nov. 6, 1997) (holding that statutory right to choose state law to govern child support does not give party right to choose foreign statute of limitations). *See generally* Newman, *supra* note 85, at 747-53.

[120] Story recognized this was the real issue presented by the analytic classification, STORY, *supra* note 84, § 563, at 944, and gave many examples, *id.* §§ 565-83, at 944-80.

[121] Whether something is procedural for conflict-of-laws purposes is completely unrelated to whether it may be deemed procedural for other purposes such as under an Erie analysis in federal court. Cases and tests finding an issue procedural in a different legal context are irrelevant. Thus, for example, statutes of limitations are procedural under Mississippi conflict-of-law rules but "substantive" for purposes of Erie, regardless of how they are characterized by the state. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). So, too, a state's choice-of-laws rules will apply in federal court as "substantive" for purposes of Erie, even when the state characterizes the issue as procedural. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Sampson v. Channell, 110 F.2d 754, 759 (1st Cir. 1940).

[122] *See* McDaniel v. Ritter, 556 So. 2d 303, 314 (Miss. 1989) (applying Mississippi rules of civil procedure to burden of pleading workers' compensation defense available under Tennessee workers' compensation scheme); *accord* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 592 (1934) ("The law of the forum governs all matters of pleading and the conduct of proceedings in court.").

[123] *See* STORY, *supra* note 84, § 634, at 1028 ("And perhaps it may be stated as a general truth, that the admission of evidence and the rules of evidence are rather matters of procedure, than matters attaching to the rights and titles of parties . . . . [But proceeding to discuss problems with the generalization.").

[124] Mississippi law determines the rules of evidence even in cases where for-

erned by Mississippi law.[125] Presumptions and burdens of proof are procedural,[126] as is a foreign direct action statute

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eign law governs other issues. For example, in one case Alabama law applied to the substantive issue of the guest statute defense while Mississippi law provided the statute of limitations. Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975). But the court proceeded to resolve a series of evidentiary issues under Mississippi law, including competence of medical expert deposition, scope of cross-examination, and impeachment. *Vick*, 316 So. 2d at 250-51. The court did not specifically decide that Mississippi rather than foreign law governed these evidentiary issues, but it applied Mississippi law presumably because it never occurred to either the parties or the court that such issues would not be governed by forum law.

[125] Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 619 So. 2d 908, 914 (Miss. 1993). *See also* Valley Forge Ins. Co. v. Strickland, 620 So. 2d 535, 542 (Miss. 1993) (holding that fees and expenses were properly awarded in case where Mississippi law was applied to permit punitive damages). The court also affirmed an award of prejudgment interest, *Strickland*, 620 So. 2d at 542, but it is not clear that any party had suggested that such interest was unavailable under any other law; moreover, the court had previously ruled that Mississippi law applied to the substantive tort issues; *id.* at 539. Accordingly, the opinion provides no guidance as to whether prejudgment interest is substantive or procedural. *Cf.* McCain v. Cox, 531 F. Supp. 771, 783 (N.D. Miss. 1982) (denying prejudgment interest under Mississippi case law but without explaining that Mississippi case applied because issue was procedural or because it was substantive and Mississippi law governed substantive issue under facts), *aff'd without opinion*, 692 F.2d 755 (5th Cir. 1982); Barnes v. Confidential Party, 628 So. 2d 283, 291 (Miss. 1993) (noting all parties assumed in argument that availability of fees was purely matter of Mississippi law).

[126] McDaniel v. Ritter, 556 So. 2d 303, 314 (Miss. 1989) (applying Mississippi rules of civil procedure to burden of proving workers' compensation defense available under Tennessee workers' compensation scheme). *See* United States Fidelity & Guar. Co. v. Yost, 183 So. 260, 263-64 (Miss. 1938) (applying Mississippi law to quantity of proof needed to establish waiver or forfeiture in cause of action arising in Tennessee):

> It cannot be disputed that the rules of substantive law of a state where a cause of action [arose] are to be applied by the court of the forum, but the quantum of proof required is governed by the law of the forum. . . .
>
> Applying our own rules as to the quantum of proof requisite to establish a waiver, we could not be controlled by the opinion of another court which applies a different rule of evidence thereasto [sic].

Yost, 183 So. 2d at 263-64. *See also* Maryland Cas. Co. v. Williams, 377 F.2d 389, 394 (5th Cir. 1967) (applying Mississippi conflict of laws rules):

> The general and prevailing rule is that presumptions, when examined as to whether they are procedural or substantive in nature for choice of law purposes, are matters of procedure. In this context presumptions are closely akin to burden of proof. Thus, the law of the fo-

authorizing claims against a tortfeasor's insurer.[127] But the cases do not follow a logical distinction between rules that regulate procedure and rules that establish rights or defenses. For example, cases hold that the defenses of spousal and parental immunity are procedural,[128] but they also hold that a testimonial privilege is substantive,[129] as is the attorney-client

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> rum governs proof of facts, as well as presumptions and inferences to be drawn from the evidence.

The court noted two exceptions to this general rule: conclusive or irrebuttable presumptions are substantive, *id.* at 394-95, as is a built-in presumption that is created as part of and in aid of the enforcement of a right. *Williams*, 377 F.2d at 394-95. *See also* Browning v. Shackelford, 196 So. 2d 365, 368 (Miss. 1967) ("[P]rocedural law of Mississippi is applicable in the trial of the case as to the weight and sufficiency of the evidence."); Wright v. Jacobs, 89 So. 2d 708, 709 (Miss. 1956) ("[P]rocedural and evidential law of Mississippi is applicable to the trial of the case, and to the weight of a determination of facts by the chancery court.").

[127] *See* Ford v. State Farm Ins. Co., 625 So. 2d 792, 796 (Miss. 1993) (dismissing claim against insurer brought under Louisiana direct action statute). This holding and its reasoning are consistent with the traditionally broad definitions of remedy and procedure. But the same result was reached by a court that characterized a direct action statute as substantive, rejecting its application on the ground that it offended the forum's strong public policy. McNeal v. Administrator, 254 So. 2d 521, 524-25 (Miss. 1971); *see also* Goodin v. Gulf Coast Oil Co., 133 So. 2d 623, 624 (Miss. 1961); Cook v. State Farm Mut. Ins. Co., 128 So. 2d 363, 368 (Miss. 1961) (holding direct action statute procedural); Marchlik v. Coronet Ins. Co., 239 N.E.2d 799, 802 (Ill. 1968) (holding that claim under Wisconsin direct action statute "is substantive and, as such, is entitled to comity, provided there is no compelling public policy of this State to the contrary" but finding Illinois public policy precluded actions under statute). *But see* Burkett v. Globe Indem. Co., 181 So. 316, 319 (Miss. 1938) (holding Louisiana direct action statute substantive and recognizing claim brought under it), *overruled by* McArthur v. Maryland Cas. Co., 186 So. 305, 310 (Miss. 1939), *criticized in* L.A. Wyatt, *Conflict of Laws—Law Governing Tort Liability—Is Right to Direct Suit Against Insurer for Tort Committed by Insured Question of Substance or Procedure?*, 11 MISS. L.J. 234, 234-37 (1938).

[128] *McNeal*, 254 So. 2d at 522-24. *See generally* John A. Travis, III, *Conflict of Laws—Interspousal Torts—Law to Govern*, 35 MISS. L.J. 308, 308-10 (1964) (criticizing decisions from other states holding that spousal immunity is governed by law of place of wrong and concluding "[t]here is little, if any, reason for a state which has adopted the better and more modern rule to give effect to the obsolete interspousal tort immunity as observed by the foreign state, in place of its own law, especially when it is the state most interested in the rights of the parties.").

[129] *See* Barnes v. Confidential Party, 628 So. 2d 283, 289 (Miss. 1993) (applying Georgia law in deposition conducted in connection with Georgia divorce pro-

privilege.[130] The availability of punitive damages[131] and the construction and interpretation of contracts are substantive and are governed by the law selected by choice-of-law rules rather than forum law.[132]

Because the distinction between substance and procedure rests more on convention and tradition than on any identifiable, functional difference,[133] Mississippi courts will probably

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ceedings to prevent divulging information admissible under Mississippi law).

[130] This is the holding of a federal court applying Mississippi choice-of-law rules, but in finding that the Mississippi law of privilege governed, the court observed that this would have been the same result if the issue had been characterized as procedural. Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 341 n.3 (5th Cir. 1972). Communications in issue were made by a Wisconsin corporation's in house counsel to its trial counsel concerning litigation in Mississippi and Oklahoma. *Hyde Constr. Co.*, 455 F.2d at 339. This litigation was itself an outgrowth of litigation initiated in Mississippi, and the plaintiffs were Mississippi residents. *Id.* In finding that Mississippi law permitted disclosure of numerous communications, the court did not appear to give special weight to or even identify the exact place where the communications were made. *Id.* at 340.

The treatment of privilege as "substantive" results in a different treatment from the Restatement's, which allows admission of a communication over a claim of privilege if it is admissible under either the law of the forum or the law of the place with the most significant relationship "with the communication." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971).

[131] *See* Valley Forge Ins. Co. v. Strickland, 620 So. 2d 535, 538-39 (Miss. 1993) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (1971)) (applying Mississippi punitive damages law when tortious conduct occurred in Mississippi).

[132] *See* Maryland Cas. Co. v. Williams, 377 F.2d 389, 393 (5th Cir. 1967) (*citing* Nationwide Mut. Ins. Co. v. Tillman, 161 So. 2d 604, 613 (Miss. 1964)) ("Mississippi characterizes law governing the construction or interpretation of a contract as substantive, but will apply its own fundamental rules of evidence and procedure, in any event."); Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 619 So. 2d 908, 912 (Miss. 1993) ("Under Mississippi law, the law governing construction or interpretation of a contract in order to enforce the agreement is substantive for conflict of law purposes."); United States Fidelity & Guar Co. v. Yost, 183 So. 260, 263 (Miss. 1938), *motion to correct denied*, 185 So. 564, 564 (Miss. 1939); Interstate Life & Accident Co. v. Pannell, 152 So. 635, 638 (Miss. 1934).

[133] Weintraub exemplifies the assumption that classifying something as a matter of procedure advances only a convenience interest of the forum: "If it would be very difficult for local judges and lawyers to adjust to the application of the foreign rule and if it is unlikely that the outcome will be altered by applications of the forum's rule, the forum's rule is properly labeled as 'procedural' for conflict-of-laws purposes and correctly applied without further analysis." RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.2C1, at 53 (3d ed. 1986). But such a functional classification is deeply problematic. First, the cas-

follow the conventional characterization of other issues as procedural, such as who can and must be parties,[134] the time when an action is commenced,[135] the division of labor between judge and jury,[136] the competence and credibility of witnesses,[137] execution of judgment (including priorities and exemptions),[138] and, perhaps, limitations on damages for certain classes of claims.[139] Some things that may seem procedural are substantive according to older authority that may be persuasive in Mississippi courts, including the survival of actions,[140] application of wrongful death statutes,[141] the measure of tort damages,[142] prejudgment interest for property

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es—at least in Mississippi—neither rely on such a distinction nor reveal in their holdings the operation of such an underlying rationale. Second, the classification of matters as procedural did not, historically, indicate that the forum had little interest (other than convenience) in the matters; on the contrary, matters of remedy and procedure were matters of form in which the forum state was deemed to have particularly strong public interest. *See* STORY, *supra* note 84, § 557, at 936-37.

[134] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 588 (1934). Although the Second Restatement avoids the term "procedure," it nevertheless provides that forum law governs a number of things traditionally characterized as procedural. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 124-28, 131-36 (1971) (parties, service, pleading, motions, burdens of proof, presumptions, counterclaims, enforcement of judgment, exemptions from execution, proof of foreign law, evidence).

[135] RESTATEMENT (FIRST) OF CONFLICT OF LAW § 591 (1934).

[136] *Id.* § 594.

[137] *Id.* § 596.

[138] *Id.* § 600.

[139] *Id.* § 606 ("If a statute of the forum limits the amount which in any action of a certain class may be recovered in its courts, no greater amount can be recovered though under the law of the state which created the cause of action, a greater recovery would be justified or required."). This provision is problematic. Inconsistent with the traditional rule that "[t]he measure of damages for a tort is determined by the law of the place of wrong," *id.* § 412, it has been questioned in cases, *e.g.*, Davenport v. Webb, 183 N.E.2d 902, 904 (N.Y. 1962). A federal court, applying Mississippi choice-of-law rules, rejected the argument that a foreign limit on non-economic damages in medical malpractice cases violated Mississippi public policy. Rieger v. Group Health Ass'n, 851 F. Supp. 788, 791-93 (N.D. Miss. 1994) (Davidson, J.).

[140] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 390 (1934).

[141] *Id.* § 391.

[142] *Id.* § 412.

damage,[143] postjudgment interest on foreign judgments,[144] and the parol evidence rule.[145]

Statutes of frauds[146] present special problems. Under old-

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[143] *Id.* § 419.

[144] *Id.* § 420.

[145] *Id.* § 599; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 140 (1971). *See* Spragins v. Louise Plantation, Inc., 391 So. 2d 97, 100-01 (Miss. 1980) (applying Arkansas parol evidence rule in case involving land sale contract for Arkansas land in which Arkansas law applied).

[146] There are two different statutes of frauds that may present choice-of-law problems in Mississippi. The general statute of frauds provides:

> An action shall not be brought whereby to charge a defendant or other party:
>
> (a) upon any special promise to answer for the debt or default or miscarriage of another person;
>
> (b) upon any agreement made upon consideration of marriage, mutual promise to marry excepted;
>
> (c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;
>
> (d) upon any agreement which is not to be performed within the space of fifteen months from the making thereof;
>
> (e) upon any special promise by an executor or administrator to answer any debt or damage out of his own estate;
>
> unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

MISS. CODE ANN. § 15-3-1 (1995).

Mississippi has also enacted a version of the statute of frauds contained in the Uniform Commercial Code:

> (1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is

er authority, if a forum deemed its statute of frauds a condition of bringing an action, its own statute would bar a foreign contract that did not satisfy the formal requirements of the statute even if the contract was enforceable under foreign law. If the forum treated its statute as a rule of evidence, however, it would permit proof of the contract by other evidence even if the writing was insufficient.[147] If a writing was a precondition of a valid contract under the law of the place of contracting, then the forum would require compliance with the foreign formal requirements.[148] Under this older approach, the Mississippi

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> received.
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
>
> (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
>
> (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted [cross-reference omitted].

MISS. CODE ANN. § 75-2-201 (1972). This statute is interpreted to complement rather than provide exceptions to the general statute of frauds. *See* H & W Indus., Inc. v. Formosa Plastics Corp., 687 F. Supp. 271, 274 (N.D. Miss. 1988), *rev'd on other grounds*, 860 F.2d 172 (5th Cir. 1988).

[147] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 602 (1934) ("If the law of the forum forbids action unless certain forms have been employed, no action can be maintained on a foreign cause of action without satisfying such requirements of form."). Comment a explains:

> *a. Statute of frauds.* If the statute of frauds of the forum requires a written agreement as a condition of bringing action on a contract of a certain sort, no action can be maintained on a foreign oral agreement even if it complies with the law of the place of contracting. If the statute of frauds of the forum affects only the admissibility of certain evidence, the action may be maintained and the plaintiff may recover if he can establish his case by other admissible evidence [cross-reference omitted].

Id. cmt. a.

[148] Comment b explains:

general statute of frauds would be evidentiary rather than an absolute precondition.[149] Accordingly, Mississippi courts should apply foreign statutes of frauds to foreign contract claims so long as there is other adequate evidence to support the claim under Mississippi Rules of Evidence.[150] This approach is consistent with the trend to treat statutes of frauds as substantive and to apply the formal requirements of foreign law when contract claims are governed by formal law.[151] But

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> *b.* The statute of frauds of the place of contracting is in some states interpreted as creating a condition to the existence of the contract. In that case, the agreement must be in writing though no writing is required by the law of the forum [cross-reference omitted].

Id. cmt. b.

[149] *See generally* Walter R. Bridgforth, Comment, *The Mississippi Statute of Frauds in the Conflict of Laws*, 14 MISS. L.J. 256, 260 (1942) (discussing Mississippi cases and concluding, "From these cases it would seem, then, that Mississippi regards the statute of frauds as a rule of substantive law.").

This approach seems consistent with recent treatments of the statute of frauds in other contexts, where the Mississippi Supreme Court has opined that a party may waive the protections of the statute of frauds, Canizaro v. Mobile Communications Corp., 655 So. 2d 25, 30 (Miss. 1995), that the purpose of the statute is to prevent frauds and it merely prescribes the form of part of the evidence and can be supplemented by oral testimony, Putt v. Corinth, 579 So. 2d 534, 538 (Miss. 1991), and that a lost memorandum can be proved by oral testimony, Williams v. Evans, 547 So. 2d 54, 57 (Miss. 1989). Similarly, the Uniform Commercial Code version of the statute of frauds is evidentiary because it allows proof when a party admits the contract. MISS. CODE ANN. § 75-2-201 (1972).

[150] Of course, the legislature, could provide that Mississippi formal requirements govern all claims. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 141 cmt. c (1971). This raises a problem whether, in cases governed by the Mississippi Commercial Code under its statutory choice-of-law provision, *see infra* note 317, the Code's statute of frauds automatically applies on the theory that the legislature intended it to govern.

[151] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 141 (1971) ("Whether a contract must be in writing, or evidenced by a writing, in order to be enforceable is determined by the law selected by application of the rules [that determine what choice of law governs in contract]."). Although the Second Restatement elsewhere derides the analytic distinction between substantive and procedural issues, it justifies its rule by observing that "arguments in favor of a substantive classification" of statutes of frauds "are the stronger and the more persuasive." *Id.* cmt. b. *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 57, at 155 ("Although most evidentiary questions are controlled by forum law, some are considered substantive. Among this last group are questions of privilege, the parol evidence rule, and problems involving the statute of frauds."); SCOLES & HAY, *supra* note 15,

the statute of frauds contained in the Mississippi Uniform Commercial Code may nevertheless apply in cases governed by the Code.[152]

B. Substance

1. Historical overview

The law of conflict of laws was viewed in the early 1800's as a sort of international common law. Convinced that the law was evolving towards increased rationality and greater international uniformity, courts and scholars searched legal sources from different jurisdictions, especially judicial opinions, for evidence of common practice.[153]

By the early 1900's, conflicts law had undergone a transformation that paralleled modernist movements in other fields of law.[154] Courts and scholars refashioned conflicts doctrines into formal rules of broad application[155] through a process of

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§ 3.8, at 57-58 ("Modern American law predominantly characterizes the Statute of Frauds as substantive."). This modern characterization returns the law to the state it was in Story's time. *See* STORY, *supra* note 84, § 262, at 397-98, § 631, at 1024 (formal requirements, including statutes of frauds, are provided by the law of the place of contracting, except for contracts affecting interests in land, which must comply with formal requirements of place where land is located, *id.* § 435, at 729).

[152] The Mississippi Uniform Commercial Code would typically apply, absent a choice of some other jurisdiction's law, so long as the transaction bears a reasonable relationship to Mississippi. *See infra* notes 317-18 and accompanying text.

[153] Justice Joseph Story was both a founder of conflict of laws, publishing the first edition of his treatise in 1834, *see generally* ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY OF CONFLICT OF LAWS (1992), and one of the chief architects of a transcendental and evolutionary vision of common law that was incorporated into several areas of law, including the practice of federal common law under the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (Story, J.), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (Brandeis, J.) ("There is no federal general common law."), and federal admiralty law. *See generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 20-22, 46 (2d ed. 1975); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 104-05 (1985) (discussing Story's contributions to development of federal law of admiralty).

[154] *See, e.g.*, G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 12-19 (1985) (summarizing rise of modern view of torts dominated by principle of negligence).

[155] This approach dominated the treatises, *e.g.*, JOSEPH BEALE, A TREATISE ON

abstraction that implicitly subverted the legal authority for particular rules.[156] Formalist commitment to rules was accompanied by the theory of vested rights that treated entitlements as things to be recognized and protected by law.[157] Formalism privileged the law of the place where events occurred giving rise to rights or obligations. For example, contracts were governed by the law of the place of contracting or performance,[158] and torts were governed by the law of the place of the injury.[159]

THE CONFLICT OF LAWS (1935), and was codified in the RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

[156] G. Edward White emphasizes the conflict between the descriptive and classificatory aims of the American Law Institute's Restatement projects in the 1930's and the reality of the practice of the A.L.I. as an elite group of jurists that worked to articulate an ideal and academic vision of law and to reduce the uncertainty inherent in actual judicial decision-making. *See* G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1, 21 (1997). He points out that the Restatement project not only acknowledged legal uncertainty as its stimulus but that the Restatements in practice accommodated more legal uncertainty that Langdell, whose approach had been simply to deny uncertainty by rejecting it as error when cases failed to abide by the supposedly right rules. *Id.*

[157] The most notorious examples of vested rights theory of law were the substantive due process cases.

[158] *E.g.*, Shaw v. Postal Tel. Cable Co., 31 So. 222, 224 (Miss. 1902) (holding that validity of contract is governed by the law of the place of the contract), *id.*, at 224 (Whitfield, C.J. dissenting) ("[A] contract valid by the statute law of the state where made is valid everywhere . . . .").

Although the Restatement strongly preferred the law of the place of contracting (understood as the place of execution of the contract), for most matters *e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332-34 (1934), except details of performance, *id.* § 358, jurisdictions were traditionally much vexed by the problem of what law to apply in contract. In the mid 1800's Mississippi apparently applied the law of the place of performance to all matters, but by the early 1900's it applied the law of the state of execution to issues other than adequacy of performance. *See generally* David E. Crawley, Jr., Comment, *Conflict of Laws in Mississippi as to Contracts*, 14 MISS. L.J. 240, 244 (1942). But the cases were never entirely consistent and relied in part on the place of making or performance as evidence of the law intended to apply by the parties. *See id.* at 250 (discussing cases).

[159] *E.g.*, Covington v. Carley, 19 So. 2d 817, 817-18 (Miss. 1944) (applying Alabama's guest statute, observing "[t]he injury occurred in Alabama, and the law applicable to the case is found in [the Alabama guest statute]."); Montgomery & Atlanta Motor Freight Lines, Inc. v. Morris, 7 So. 2d 826, 827 (Miss. 1942) ("The collision and death took place in the State of Louisiana, therefore the rights of

In the mid 1900's, functionalism began to displace formalism in conflict-of-laws scholarship. Courts and scholars challenged the formalist vision of law, seeking extra-legal purposes for laws and viewing rights as something created by law.[160] Professor Brainerd Currie's theory of Interest Analysis, which directed application of forum law whenever the forum state had an identifiable interest,[161] and other theories gained support.[162] Influential jurisdictions abandoned traditional rules,[163] and a second Restatement was published for conflict

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the parties are governed by the laws of that state."), *suggestion of error overruled*, 8 So. 2d 502 (Miss. 1942); Welch v. Kroger Grocery Co., 177 So. 41, 42 (Miss. 1937) ("Our court has frequently held, and we believe it is the rule everywhere, that actions in tort are governed by the law of the place where the injury occurred . . . ."); Chicago, St. Louis & N.O. Ry. Co. v. Doyle, 60 Miss. 977, 983-84 (1883). *See generally* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377-79 (1934).

[160] Various theoretical schools, such as legal realism and sociological jurisprudence, shared a functional vision of law and a distaste for formalism. Legal realism is usually explained as a reaction against legal formalism, *see, e.g.*, RICHMAN & REYNOLDS, *supra* note 15, § 54, at 147, but the actual chronology of developments in Conflict of Laws reveals that legal realism and high formalism emerged at about the same time. Influential articles critical of formalism in conflicts theory appeared in the 1920's and 1930's. *See* David Cavers, *A Critique of the Choice-of-Law Problems*, 47 HARV. L. REV. 173, 173-208 (1933); Walter Wheeler Cook, *Jurisdiction of Sovereign States and the Conflict-of-Laws*, 31 COLUM. L. REV. 368, 384 (1931); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924). *See generally* Ernest G. Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1927). The roots of the functional approach to law in America go back at least to Oliver Wendell Holmes, Jr., *The Common Law* (1881). Holmes himself challenged formalist assumptions behind federal general common law, *see* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting), but he espoused more conventional formalist doctrine in his international conflicts opinions. *See* Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904). It thus seems most accurate to understand both formalism and various anti-formalist theories as symbiotic movements in modernist legal theory.

[161] Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (1959).

[162] *See generally* Olger C. Twyner, III, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L.J. 563, 590-92 (1982) (summarizing modern choice-of-law theories).

[163] Babcock v. Jackson, 191 N.E.2d 279, 285 (N.Y. 1963); Haag v. Barnes, 175 N.E.2d 441, 443-44 (N.Y. 1961); Auten v. Auten, 124 N.E.2d 99, 103-04 (N.Y.

of laws that rejected rigid territorial principles in favor of balancing contacts and evaluating competing policy interests in conflicts cases.

By 1967 the Mississippi Supreme Court had signaled its willingness to consider adopting the newer approach,[164] and in 1968 it announced its adherence to the newer approach of the Restatement Second.[165] Expressing a preference for forum

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1954). *See generally* Michael B. Taylor, *Conflict of Laws—Applicable Law for Multi-State Tort Actions*, 37 MISS. L.J. 157, 157-59 (1965) (discussing movement away from traditional territorial choice-of-law rules). Although such cases are almost always viewed as revealing a distinct trend in conflict of laws in United States jurisdictions, they closely paralleled other international trends towards the extraterritorial application of forum law. *E.g.*, M.M. BOGUSLAVSKII, PRIVATE INTERNATIONAL LAW: THE SOVIET APPROACH 160-61 (David Winter & William B. Simons trans. 1988):

> In those cases where a Soviet court or arbitral tribunal considers claims arising out of torts committed abroad, Soviet courts also must proceed from the general conditions of *lex loci delicti* by applying the legislation of the place of the tort . . . . At the same time, the Soviet doctrine of private international law has put in a special position those instances where a Soviet citizen abroad inflicts harm upon the Soviet state, its organizations, or other Soviet citizens. It is provided in current Soviet law (Art. 126-4, para. 2 Principles) that "the rights and duties of parties in obligations arising as a consequence of inflicting harm abroad is determined according to Soviet law where the parties are Soviet citizens or Soviet organizations.

[164] In *Browning v. Shackelford*, 196 So. 2d 365, 372 (Miss. 1967), the court applied the Alabama guest statute but observed that there had been "drastic repudiation" of the doctrine of *lex loci delicti* among both courts and scholars during the previous decade. The court expressly signaled its willingness to consider a challenge to the rule in an appropriate case: "In a proper case, under proper facts, and at a proper time, the intrinsic merits and demerits of the [newer approach] can be considered." *Browning*, 196 So. 2d at 372.

Chief Justice Ethridge specially concurred expressing more forcefully his disinclination to adhere to the rule of *lex loci delicti*: "The old rule that the governing law was invariably that of the place where the injury occurred is today almost wholly discredited . . . ." *Id.* at 373 (Ethridge, C.J., specially concurring). His concurring opinion quoted in full relevant provisions from the Restatement Second and advanced a number of arguments that he would repeat the next year in *Mitchell v. Craft*, *see infra* notes 165-69 and accompanying text. *Id.* at 373-74 (Ethridge, C.J., specially concurring). Justice Rodgers, who first announced the adoption of the Restatement Second approach the next year, *see infra* note 165, also subscribed to the specially concurring opinion. *Id.* at 374.

[165] In *Craig v. Columbus Compress & Warehouse Co.*, 210 So. 2d 645, 646, 648

law and a reluctance to apply laws repugnant to forum policy,[166] the court questioned the benefits of the traditional

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(Miss. 1968), the appellant argued that Tennessee law should apply in a dispute over warehouse receipts when the receipts were located in Tennessee even though the bales of cotton were located in Mississippi. In affirming the trial court's application of Mississippi law, Justice Rodgers opined that Mississippi law applied under the traditional rule that validity of transfers of interests in personal property is governed by the law of the place where the personal property is located at the time of the transfer. *Craig*, 210 So. 2d at 649. But Justice Rodgers also considered newer approaches and concluded that they led to the same result:

> In recent years there is a trend in some state and federal courts to adopt the "center of gravity doctrine." This doctrine is a rule whereby the court trying the action applies the law of the place which has the most significant relationship to the event and parties, or which, because of the relationship or contact with the event and parties, has the greatest concern with the specific issues with respect to the liabilities and rights of the parties to the litigation. 15A C.J.S. Conflict of Laws § 8(2) (1967).
>
> In the instant case, all of the interested parties are within the borders of Mississippi. The warehouse receipts are Mississippi contracts. The theft of these receipts occurred within this state. The property was stored in Mississippi. The cotton was released under Mississippi law on duplicate receipts. The cotton was grown, harvested and baled in Mississippi. In fact, everything with reference to the transaction occurred within this state, except the sale of stolen warehouse receipts.

Id. at 649.

Of course, Justice Rodger's statements about the newer trend was pure dictum, since the case was decided on traditional choice-of-laws rules. But less than one month later, the court released its opinion in *Mitchell v. Craft*, 211 So. 2d 509, 510 (Miss. 1968), a wrongful death action arising from a two-car collision in Louisiana in which two Mississippi domiciliaries were killed. Mississippi had enacted comparative negligence but Louisiana retained common law contributory negligence. *Mitchell*, 211 So. 2d at 500. The circuit court gave peremptory instructions, applying Louisiana's contributory negligence. *Id.* The Mississippi Supreme Court reversed. *Id.* at 516. Justice Ethridge announced:

> We modify the previously existing rule in this jurisdiction, which applied invariably the law of the place of injury, and hold that under the factual situation existing in this case, the most substantial relationships of the parties and the dominant interest of the forum require application of Mississippi law, in accordance with the principles summarized in the Restatement (Second) Conflict of Laws sections 175, 145, 164 and 6 (Proposed Official Draft, Adopted May 24, 1968).

Id. at 510. *See generally* Twyner, *supra* note 162, at 591-93 (discussing *Mitchell*).

[166] The court stated:

> We will assume that a case is to be governed by the law of the forum

choice-of-law rule that applied the law of the place of the injury[167] and cited with approval recent scholarship critical of the traditional approach.[168] Finally, the court quoted in full the Restatement Second sections applicable to the case,[169] thereby

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> unless it is expressly shown that a different law applies, and in case of doubt, a court will naturally prefer the laws of its own state. Moreover, a forum state will not favor application of a rule of law repugnant to its own purposes, and forum law should presumptively apply unless it appears that non-forum contacts are of greater significance. [Citations omitted.]

Mitchell, 211 So. 2d at 512.

[167] The court explained that the only merits of the traditional rule were certainty, predictability, and ease of application. *Id.* at 513.

[168] The court cited a dozen law review articles published from 1952 to 1967. *Id.* at 513 n.3. Justice Ethridge's opinion devoted special attention to the Better Rule theory promoted by Leflar: "In a major contribution in this field, Robert Leflar has synthesized and analyzed five principal, choice-influencing considerations. [Citations omitted.]" *Id.* at 514. Justice Ethridge proceeded to apply Leflar's five considerations. *Id.* He discounted the first (predictability), because it pertained to contracts, and the second (maintenance of interstate order), because neither state would be affected by the court's decision. *Id.* He found that the third (simplification of the judicial task) did not prevent application of forum rules that were simple and easy to apply. *Id.* The fourth (advancement of government interests) dictated application of Mississippi's comparative negligence standard in cases involving Mississippi domiciliaries. *Id.* Justice Ethridge found that Leflar's fifth consideration (application of the better law) likewise indicated application of Mississippi law:

> Finally, an important consideration is application of the better rule of law. We believe in our own law in this instance. Comparative negligence, although utilized in diverse ways in only seven states, is a fairer and more economically equitable standard of liability than that of the common-law rule of contributory negligence.

Id. Justice Ethridge did not appear to appreciate that Leflar's approach was not necessarily consistent with the approach of the Second Restatement.

[169] *Id.* (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 164, 175 (Proposed Official Draft, adopted May 24, 1968)). The court also quoted (without citing) section 146 in concluding:

> The above conflict-of-law or choice-of-law rules which we adopt require only a modification and not an overruling of earlier cases applying the law of the state where the injury occurred. Ordinarily, the local law of the state where the injury occurred will determine the rights and liabilities of the parties, "*unless* with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied."

Mitchell, 211 So. 2d, at 516 (quoting (with emphasis added, ellipses and citation joining a growing number of jurisdictions that embraced the Restatement Second approach.[170] The court has applied the Restatement Second approach consistently to choice-of-law issues in every area of law except "procedure" since 1968.[171]

The 1968 Revolution[172] in Mississippi conflicts law logi-

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omitted) RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (Proposed Official Draft, adopted May 24, 1968)).

[170] As of 1996, 25 states had adopted the Restatement Second in resolving choice-of-law problems in either torts or contracts. *See generally*, Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. OF COMP. L. 181, 447, 459-60 (1997). Only 12 states retain the traditional *lex loci delicti* or *lex loci contractus* rule. *Id. See also* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 370-72 (1992) (listing 15 states that followed traditional approach).

[171] Some states have adopted the Restatement approach only for torts and others have adopted it only for contracts. *Id.*

[172] It is not an overstatement to describe the change inaugurated by the opinion in *Mitchell v. Craft* as a revolution. It was unprecedented in Mississippi cases. Justice Ethridge claimed that "in other areas of conflicts law this Court has examined choice-influencing considerations and the most significant relationships of the occurrence and the parties in order to determine the choice of applicable law." *Mitchell*, 211 So. 2d at 515. Nevertheless, the only cases he identified in support of his claim were in the area of workers' compensation and provided scant authority. *Id.*

Burnham Van Serv., Inc. v. Dependents of Moore, 164 So. 2d 733, 740 (Miss. 1964) held that Mississippi workers' compensation death benefits applied in a claim brought by dependents of a Mississippi employee who died outside Mississippi. But the court relied on the fact that the Mississippi Workers' Compensation Act explicitly provided for its extraterritorial application to in-state employees injured during temporary absence for the state. *Burnham Van Serv.*, 164 So. 2d at 741. This was not a departure from traditional choice-of-law rules, on the contrary, it exemplified one of the black letter rules of the First Restatement. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 398 (1934) ("A workman who enters into a contract of employment in a state in which a Workmen's Compensation Act is in force can recover compensation under the act in that state for bodily harm arising out of and in the course of the employment, although the harm was suffered in another state. . . .").

In *Mandle v. Kelly*, 90 So. 2d 645, 650 (Miss. 1956), the court held that the Mississippi Workers' Compensation Act did not apply to a Georgia employee injured during temporary presence in Mississippi. But the court based that decision on the employee's contract executed in Georgia under which the employer was released from any compensation law other than Georgia's. *Mandle*, 90 So. 2d at 650. The court also based its decision on the incorrect idea that it was constitutionally prohibited from applying the Mississippi act. *Id. Cf.* Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 73 (1954) (holding that due process did not require state to honor non-action clause, valid under state law where executed, cally suggests that holdings of pre-1968 cases are unreliable guides for what the Mississippi courts will do today. But logic has not always triumphed, and older cases on point may still be influential even though the court has abandoned the underlying theory behind such holdings.[173] Nevertheless, pre-1968 cases are weak, if not inappropriate, authority for current Mississippi choice-of-law rules, and recourse to such cases is

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when state had interest in safeguarding rights of persons injured there); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 504-05 (1939) (holding that full faith and credit did not prohibit state where accident occurred from applying its own workers' compensation law).

Neither of these cases supported Justice's Ethridge's claim that Mississippi had departed from traditional choice-of-law rules in other areas of law.

[173] *White v. Malone Properties, Inc.*, 494 So. 2d 576, 578 (Miss. 1986) held that Louisiana law applied and that Louisiana workers' compensation provided the exclusive remedy in an action brought by a Mississippi resident permanently working in Louisiana. Characterizing Louisiana's limitations period as substantive, moreover, the court held that the workers' compensation remedy was time barred. *White*, 494 So. 2d at 578-79. The court relied on two pre-1968 cases as well as on the Restatement Second approach. *Id.*

Justice Robertson concurred in the holding but criticized the reasoning of the majority:

> Reliance upon [pre-1968 caselaw] in a 1986 choice of law case is about as sound as reliance upon Ptolemaic astronomy after Copernicus. It is like arguing for a post-Einstein resurrection of Euclidian geometry because in a given instance Euclidian principles produce a satisfactory result. To use a more lawyer-like metaphor, what the majority does today is analogous to a federal court in a 1986 diversity case relying upon pre-*Erie* federal precedents to furnish the rule of decision on a question of state law. In such a case I doubt any knowledgeable lawyer would suggest that, because the pre-*Erie* case reached a consistent result, that case was authoritative precedent in the post-*Erie* era.

Id. at 579 (Robertson, J., concurring).

Justice Robertson's criticism of the majority, joined by Justice Prather, seems entirely justified. Although it may have been convenient to rely on cases directly on point, especially when they supported the result reached under the court's current approach, the practice sends a confusing signal to the bar.

See also Estate of Lawrence Thomas Jefferson, No. 95-CA-00226 COA, slip op. at 6-7 (Ct. App. Miss. Jan. 30, 1996) (not designated for publication and may not be cited pursuant to MISS. R. APP. P. 35-B) (citing and relying on three pre-*Mitchell* cases for conclusion that Alaska law governed promissory note executed and payable in Alaska, notwithstanding chancellor's finding that most significant relationship of contract was in Mississippi due to Mississippi residence of payor and fact that note was secured by Mississippi real property).

inconsistent in theory[174] and risky in practice.

The Restatement Second follows the first Restatement in promulgating different choice-of-laws rules for different areas of substantive law. Because the same transaction or occurrence may give rise to liability under different theories, plaintiffs have considerable control over the choice-of-law rules that will apply. A plaintiff who suffers personal injuries might assert tort-based claims for negligence or claims for breach of implied warranty sounding in contract. A party seeking compensation for an agreement that has gone bad might assert claims for contract, demand restitution, or even seek imposition of a constructive trust on some proceeds of the transaction. Different choice-of-law rules may apply to each claim, and closely related claims may end up being governed by the law of different states.[175]

2. *Property*

In Mississippi, rights in real property are determined by the most significant relationship approach of the Restatement Second.[176] Normally, as under the traditional approach,[177] both the validity of a conveyance of an interest in real property and the construction of an instrument of conveyance are governed by the law of the place of the land.[178] But, even in a case applying the law of the place of the land, the supreme court cautioned that the location of land is not the "overriding consideration."[179] The court will consider "whether the policies

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[174] Justice Robertson wrote in his concurrence in *White*:

> This Court's adoption of the center of gravity test [citations omitted] represented a major reformulation of choice of law doctrine in this state. The traditional rule of lex loci—the law of the place—was effectively abandoned. Since that time we have employed the center of gravity analysis in *every* choice of law case coming before this Court [citations omitted]. For this reason, pre-*Mitchell* and pre-*Craig* cases, no matter how similar to a given case under consideration on their facts or on the questions of law presented, are of little or no precedential value and should be cited and relied upon with great caution.

White, 494 So. 2d at 580 (Robertson, J., concurring).

[175] *See, e.g.*, Price v. Litton Sys., Inc., 784 F.2d 600, 606-08 (5th Cir. 1986) (concluding that Mississippi courts would apply separate choice-of-law analysis to breach of warranty theory). For cases applying different states' limitations due to different choice-of-law rules applicable to different claims, see *supra* note 95.

[176] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971):

> The interests of the parties in a thing are determined depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.

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[177] RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 211, 214, 218, 220, 221 (1934).

[178] *See* Kountouris v. Varvaris, 476 So. 2d 599, 606-07 (Miss. 1985) (opining that formal defects in power of attorney that prevented it from conveying real property in Mississippi would not necessarily prevent it from conveying real property in Greece). The opinion relied on the Restatement Second:

> *Validity and Effect of Conveyance of Interest in Land*
> (1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.
> (2) These courts would usually apply their own local law in determining such questions.

Kountouris, 476 So. 2d at 606 (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971)). The court also suggested that the construction of an instrument of conveyance would be governed either by the law indicated in the instrument or by the law of the place of the land:

> *Construction of Instrument of Conveyance*
> (1) An instrument of conveyance of an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the instrument.
> (2) In the absence of such a designation the instrument is construed in accordance with the rules of construction that would be applied by the courts of the situs.

Id. at 606 (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 224 (1971)). *Cf.* Anderson v. Sonat Exploration Co., 523 So. 2d 1024, 1027 (Miss. 1988) ("The fact that the affected land is in Louisiana may make the law of that state controlling under our 'center of gravity' text . . . but it does not, of itself, defeat the jurisdiction of our courts.").

[179] In *Spragins v. Louise Plantation, Inc.*, 391 So. 2d 97 (Miss. 1980), the court held that Arkansas law applied in an action for the specific performance of a contract for the sale of land between Mississippi residents when the real property was located in Arkansas, but the court did not base its conclusion exclusively on the location of the land. On the contrary, it referred to its prior adoption of the center of gravity or most significant relationship test, quoted section six from the Restatement Second, and concluded:

> Although the location of the land is not the overriding consideration, that coupled with the fact that all of the contracts and brokerage agree-

of each state were in conflict, the location of the property in question, the location of the execution of the agreements, the intent of parties . . . and the place where the deeds themselves were recorded."[180] Thus the court applied Mississippi equitable tracing principles but recognized Louisiana community property law in finding a former spouse entitled to a one-half interest in mineral rights in Mississippi that were titled in the other spouse's name when the rights had been purchased during the couple's marriage in Louisiana, a community property state.[181] On the other hand, the court held that the Mississippi Partnership Act applied to determine partners' property interests in land located in Louisiana when the partnership was formed in Mississippi between Mississippi residents, and the partnership agreement provided that dissolution would be governed by Mississippi law.[182]

Under the Mississippi Code, nonresident foreign nationals may not acquire more than 320 acres of land for industrial development nor more than five acres for residential purpos-

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> ments were executed and signed in Arkansas gives Arkansas more of an interest in the case. The parties, in addition to the foregoing reasons, probably expected Arkansas law to be applied especially since they failed to include a choice of law clause in any of the documents and because the land deeds had to be recorded in Arkansas.

Spragins, 391 So. 2d at 100.

[180] *See* Tideway Oil Programs, Inc., v. Serio, 431 So. 2d 454, 458 (Miss. 1983) (remanding for determination whether Mississippi or Louisiana law should govern dispute involving alleged co-tenants of oil leases in Louisiana). The court emphasized that it lacked an evidentiary basis for making the choice of law, but it suggested that it appeared Louisiana law might apply, given the averments that the land was in Louisiana, the assignments were recorded in Louisiana, the relationship among the litigants arose from a co-tenancy located in Louisiana, a de facto agreement may have arisen from actions in Louisiana, and Louisiana "custom and usage" were relevant. *Serio*, 431 So. 2d at 458. Nevertheless, the court stated that because all litigants were Mississippi residents, it was unable to conclude that Mississippi law did not apply in the absence of a full evidentiary record. *Id.*

[181] Palmer v. Palmer, 654 So. 2d 1, 2-4 (Miss. 1995) (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 234 (1971)).

[182] Crowe v. Smith, 603 So. 2d 301, 307-08 (Miss. 1992) (holding that interests in land farmed in Louisiana were governed by Mississippi partnership law even though, under Louisiana law, partnership did not own title to Louisiana real property).

partnership agreement provided that dissolution would be governed by Mississippi law.[182]

Under the Mississippi Code, nonresident foreign nationals may not acquire more than 320 acres of land for industrial development nor more than five acres for residential purposes.[183] But the Code does not limit the acquisition of personal property and does not apply 1) to citizens of Syria or Lebanon,[184] 2) to former U.S. citizens who became aliens upon marriage, or 3) to aliens who intend to become citizens.[185] Obviously, relevant federal treaties supersede.[186]

Personal property conflicts cases are also decided by a balancing approach and specific provisions[187] of the Restatement Second.[188] Accordingly, Mississippi law determines who owns a car purchased and operated in Mississippi.[189] In the absence of a valid choice of law, a spouse's interest in a military retirement pension is determined by the law of the place where the parties were domiciled at the time the interest vested.[190] If the parties moved, different state laws would ap-

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[182] Crowe v. Smith, 603 So. 2d 301, 307-08 (Miss. 1992) (holding that interests in land farmed in Louisiana were governed by Mississippi partnership law even though, under Louisiana law, partnership did not own title to Louisiana real property).

[183] MISS. CODE ANN. § 89-1-23 (1991). In *Turner v. Turner*, 612 So. 2d 1141, 1143 (Miss. 1993), the court refused to consider an argument that a nonresident alien's surviving spouse could not inherit under this statute when the issue had not been raised before the chancellor and was raised for the first time on appeal.

[184] The special treatment for selected nationalities raises a possible equal protection issue. The issue was argued on appeal, but the Fifth Circuit refused to consider it because it had not been raised at trial. De Tenorio v. McGowan, 510 F.2d 92, 101 (5th Cir. 1975). Nevertheless, Judge Coleman, writing for the majority, suggested that invalidating the statute might not protect foreign nationals' rights, as it might lead to the revival of the previous valid statute or to the disability of all nonresident aliens under Mississippi common law. *De Tenorio*, 510 F.2d at 101. (citing Scottish Am. Mortgage Co. v. Butler, 54 So. 666, 669 (Miss. 1911)).

[185] *Id.*

[186] U.S. CONST. art. VI, cl. 2. For example, where a treaty with Honduras provided for a right of Honduran citizens to dispose of inherited property within three years of succession, that right superseded any inconsistent state law. *De Tenorio*, 510 F.2d at 95-96.

[187] *See supra* note 178 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971)). There is a preference for applying the law of the place where the personal property is located, *e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 244 (1971):

> (1) The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in § 6.

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domicile at death absent designation of law in will).

The traditional rules governing personal property relied on both the law of the territory and the owner's domicile. *See generally* Edwin W. Briggs, *The Dual Relationship of the Rules of Conflict of Laws in the Succession Field*, 15 MISS. L.J. 77 (1943).

[188] *See* Newman v. Newman, 558 So. 2d 821 (Miss. 1990) (holding RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 258-59 (1971) governed former spouse's right to share of military pension). In his opinion for the court Justice Robertson quoted in full the applicable provisions of the Restatement Second and observed that the rule comported with ancient precedent, recent scholarship, and authority from other jurisdictions. *Newman*, 558 So. 2d at 824-25.

[189] Boardman v. United Serv. Auto. Ass'n, 470 So. 2d 1024, 1039 (Miss. 1985). This seems the best interpretation to give the court's confusing discussion. The Fifth Circuit had certified the question of whether Mississippi or Nebraska law would govern the issue of car ownership. *Boardman*, 470 So. 2d at 1027, 1039. In answering the question certified, the Mississippi Supreme Court stated that the issue would be governed by the "center of gravity" approach but further observed that "[t]he vehicle ownership question in this case is one of contract construction." *Id.* The opinion presumably made this observation because the need to determine the owner of the car was presented by a contract clause excluding liability while operating certain cars "*owned*" by the insured. *Id.* But the law of Mississippi and Nebraska apparently did not conflict as to what the contracting parties meant by "owner." *Id.*

The only issue was what law determined ownership, and the court held that this was governed by Mississippi law. *Id.* In other words, the court looked to the law of the place where the car was purchased and operated to determine who the owner was. For that reason, the opinion should be read as authority for a personal property choice-of-law rule rather than one dealing with contract construction.

[190] *Newman*, 558 So. 2d at 824-25. It is important to note that the posture of the case did not involve an equitable distribution. Rather the parties had been previously granted a divorce (in Mississippi), and the former wife moved to California where she remarried. *Id.* She returned to litigate the issue of the pension after the former husband's retirement. *Id.* Accordingly, the court was presented with a fairly simple issue of title to property, not further complicated by its remedial power in a divorce suit to decree equitable distribution. *Id. See also* Flowers v. Flowers, 624 So. 2d 992, 995 (Miss. 1993) (holding that chancellor erred as matter of law in finding that wife shared interest in pension acquired prior to marriage by resident of Mississippi).

ply pro rata.[191] Nevertheless, in distributing property during divorce under principles of equitable distribution, Mississippi courts apply Mississippi property rules in apportioning rights in a pension that vested under the law of another state.[192]

Conflict-of-laws problems that concern security interests in personal property that is moved from one state to another have been the target of legislative action.[193] The Uniform Commercial Code provides rules regarding perfection of security interests,[194] and motor vehicle statutes provide still more specific rules.[195]

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[191] *Newman*, 558 So. 2d at 825 n.1.

[192] Savelle v. Savelle, 650 So. 2d 476, 478 (Miss. 1995). Justice Prather's dissent pointed out that the court did not fully appreciate the conflict-of-laws issues presented in the case. *Savelle*, 650 So. 2d at 479-80 (Prather, P.J., dissenting). She argued (rightly, I think) that in making its initial determination regarding the status of the assets for purposes of equitable distribution, the chancellor should have applied Louisiana law (where the couple was domiciled during the acquisition of the interest in the pension). *Id.* (Prather, P.J., dissenting).

[193] For a discussion of pre-Code cases that demonstrate some of the problems that legislation was designed to address, *see* John R. Bradley, Jr., et al., *1965-66 Mississippi Supreme Court Term—Some Significant Cases*, 38 MISS. L.J. 1, 2-4 (1966).

[194] MISS. CODE ANN. § 75-9-103 (Supp. 1997):

> (1) Documents, instruments, letters of credit, and ordinary goods.
>
> (b) [P]erfection and the effect of perfection . . . are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.
>
> (c) If the parties . . . understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection . . . until thirty (30) days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.
>
> (d) When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected [unless action is required by Part 3 of this chapter to perfect the security] . . .
>
> (2) Certificate of title
>
> (b) [P]erfection and the effect of perfection . . . are governed by the law (including the conflict-of-laws rules) of the jurisdiction issuing the certificate until four (4) months after the goods are removed from that jurisdiction and thereafter until the goods are

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> registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title . . .
>
> (c) [A] security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to [§ (1)(d)].
>
> (d) If goods are brought into this state while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this state and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.
>
> [Other sections give rules for accounts, general intangibles, mobile goods, chattel paper, minerals, and investment property.]

The conflicts rules in Article Nine have been repeatedly amended. *See* D. Fenton Adams, *The 1972 Official Text of the Uniform Commercial Code: Analysis of Conflict of Laws Provisions*, 45 MISS. L.J. 281, 382-84 (1974); A. Spencer Gilbert III, *Observations of UCC Article 9: Mississippi's First Five Years*, 44 MISS. L.J. 208, 209-11 (1973) (discussing conflicts rules in original version of U.C.C.); George W. Stengel & Don P. Lacy, *The Uniform Commercial Code: A Preview*, 37 MISS. L.J. 55, 82-83 (1965).

[195] MISS. CODE ANN. § 63-21-43(3) (1996):

> If a vehicle is subject to a security interest when brought into this state, the validity of the security interest is determined by the law of the jurisdiction where the vehicle was when the security interest attached, subject to the following:
>
> (a) If the parties understood at the time the security interest attached that the vehicle would be kept in this state and it was brought into this state within thirty (30) days thereafter for purposes other than transportation through this state, the validity of the security interest in this state is determined by the law of this state.
>
> (b) If the security interest was perfected under the law of the jurisdiction where the vehicle was when the security interest attached, the following rules apply:
>
> (i) If the name of the lienholder is shown on an existing certificate of title issued by that jurisdiction, his security interest continues perfected in this state.
>
> (ii) If the name of the lienholder is not shown on an existing certificate of title issued by that jurisdiction the security interest continues perfected in this state for four (4) months

3. *Marriage*

The general rule is that a marriage that is valid where it is celebrated is valid everywhere, and a marriage that is invalid where it is celebrated is invalid everywhere.[196] Although sup-

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> after a first certificate of title of the vehicle is issued in this state, and also thereafter if, within the period of four (4) months, it is perfected in this state. The security interest may also be perfected in this state after the expiration of the period of four (4) months, in which case perfection dates from the time of perfection in this state.

Older authority held this statute provides the exclusive method for perfecting such security interests. *See* Memphis Bank & Trust Co. v. Pate, 362 So. 2d 1245, 1248-49 (Miss. 1978) (citing MISS. CODE ANN. § 63-21-55 (1996)) (holding that statute governing perfection of security interests in motor vehicle applied over more general provisions of Uniform Commercial Code). But the Uniform Commercial Code has been subsequently amended to refer specifically to certificates of title. *See supra* note 194 (quoting text of current statute). *See generally* UNIF. COMMERCIAL CODE § 9-103, 3 U.L.A. 146-47 (1992) (Official Reasons for 1972 Change & Supp. 1997) (1994 amendments).

[196] *See generally* STORY, *supra* note 84, § 113, at 197 ("The general principle certainly is . . . that between persons, *sui juris*, marriage is to be decided by the law of the place, where it is celebrated. If valid there, it is valid every where. It has a legal ubiquity of obligation. If invalid there, it is equally invalid every where."). The traditional rules were set forth in the first Restatement: "Except as stated in §§ 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are compiled with." RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 121 (1934). The first exception provided that parties to a divorce that were prohibited from remarrying for a certain period of time could not obtain a valid marriage out of their home state if their home state interpreted the prohibition upon remarriage as having extraterritorial effect. *Id.* § 131. The second exception provided:

> A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been compiled with, will be invalid everywhere in the following cases:
>
> (a) polygamous marriage,
>
> (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil, . . .
>
> (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.

Id. § 132. The exceptions were largely derived from Story's treatise. STORY, *supra* note 84, §§ 113 *a*-124 *a*, at 197-234. The Second Restatement retains the traditional preference for recognizing a marriage valid where celebrated but states the rule more generally. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was port for the general rule may be questionable in extreme cases,[197] the Mississippi Supreme Court has stated that an out-of-state marriage will be recognized as valid, unless it violates a statutory prohibition or fundamental policy prohibiting such extraterritorial marriages.[198] Accordingly, a common-law mar-

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contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").

[197] The achievement of formalism in conflicts theory is nowhere more apparent than in the marriage rules. These general rules (and exceptions) are repeated with little question in the treatises. *See* RICHMAN & REYNOLDS, *supra* note 15, § 116; SCOLES & HAY, *supra* note 15, § 13.5, at 436; WEINTRAUB, *supra* note 133, § 5.1A, at 230. But there are few cases supporting application of the rules at the fringes, and their appeal is hardly intuitive. According to both Restatements, for example, Mississippi (and all other states) might be required to recognize certain polygamous marriages that are not invalid where celebrated or illegal under the law of any of the spouses' domiciles. But there is little or no authority for this, and its application by courts is highly doubtful. For example, *I Divorce Thee, I Divorce Thee*, MEMPHIS COMM. APP. A-2 (Feb. 24 1990), a short news article, intended as humorous, recounted how a judge in Atlanta had granted three divorces simultaneously to a husband who was a partner to three wives as a result of marriages in West Africa. The article also contained an interview with the District Attorney who, when asked about prosecuting the husband for criminal bigamy, responded, "We don't have room in our jail for bigamists." *Id.*; *see* SCOLES & HAY, *supra* note 15, § 13.18, at 462 ("It may be doubted whether a foreign visitor would be permitted to cohabit here with his four wives although even this is uncertain.").

Conversely, the rules stated in the Restatements would prevent Mississippi from recognizing a valid interracial marriage celebrated in Mississippi between South African citizens who came here to obtain the benefit of our marriage law prior to the fall of the apartheid system in South Africa. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971); RESTATEMENT (FIRST) CONFLICT OF LAWS § 132(c) (1934). But there is no authority for such a result, nor any reason for it. *See* STORY, *supra* note 84, § 123 *a*, at 221, § 124 *a*, at 233-34 (French rule that extraterritorial marriages of its domiciliaries are void should be disregarded by other countries, and such French rule is "an usurpation, founded in injustice, and a disregard of the true duty and policy of all civilized nations in their intercourse with each other."); Albert A. Ehrenzweig, *Miscegenation in the Conflict of Laws: Law and Reason Versus the Restatement Second*, 45 CORNELL L.Q. 659, 659-78 (1960) (showing lack of case authority for rules as formulated in both Restatements and criticizing result).

[198] *See* Turner v. Turner, 612 So. 2d 1141, 1143 (Miss. 1993) (observing that Mississippi "must recognize a marriage solemnized under the laws of a sister state."); Miller v. Lucks, 36 So. 2d 140, 141 (Miss. 1948) ("[T]his marriage being valid in Illinois, where contracted, must be recognized and given effect as such unless to do so violates this Statute or the state's public policy as declared there-

riage celebrated in Georgia that is valid in Georgia is recognized in Mississippi.[199] Mississippi statutes provide, however, that incestuous marriages are void and that an out-of-state marriage of parties within the prohibited degrees of kinship is also void if the parties celebrated the marriage outside Mississippi in an effort to avoid the prohibition with the purpose of returning to the state.[200]

The extraterritorial effects of homosexual marriages recently excited public attention following a 1994 Hawaii Supreme Court decision[201] that was interpreted as paving the

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in."); Walker v. Matthews, 3 So. 2d 820, 824 (Miss. 1941) (recognizing common-law marriage that had been established in Alabama even though couple returned to Mississippi which had no common law marriage at time). *See generally* N. Shelton Hand, Jr., Mississippi Divorce, Alimony & Child Custody §§ 1-3 (4th ed. 1996). These cases have all involved marriages contracted in other states of the United States, and the language in the opinions has accordingly referred to the rule providing for the recognition of marriages from sister states. Nevertheless, because Mississippi is not required to recognize such marriages under the Full Faith and Credit Clause, these cases establish a rule of comity under Mississippi conflict-of-laws principles, and the cases provide authority for the general validity of marriages celebrated in foreign countries, too.

[199] George v. George, 389 So. 2d 1389, 1390 (Miss. 1980) ("[I]f a valid common-law marriage was celebrated in Georgia, it will be recognized in this state.").

[200] Miss. Code Ann. § 93-1-1(1) (Supp. 1997):

> The son shall not marry his grandmother, his mother, or his stepmother; the brother his sister; the father his daughter, or his legally adopted daughter, or his grand-daughter; the son shall not marry the daughter of his father begotten of his stepmother, or his aunt, being his father's or mother's sister, nor shall the children of brother or sister, or brothers and sisters intermarry being first cousins by blood. The father shall not marry his son's widow; a man shall not marry his wife's daughter, or his wife's daughter's daughter, or his wife's son's daughter, or the daughter of his brother or sister; and the like prohibition shall extend to females in the same degrees. All marriages prohibited by this subsection are incestuous and void.

Section 93-1-3 of the Mississippi Code provides: "Any attempt to evade section 93-1-1 by marrying out of this state and returning to it shall be within the prohibitions of said section." *Id.* § 93-1-3 (1994). It is a crime to violate these provisions punishable by up to ten years imprisonment. *Id.* § 97-29-27 (1994).

[201] Couples denied a marriage license under Hawaii legislation restricting marriage to heterosexual couples, Haw. Rev. Stat. § 572-1 (1985), challenged the law under the state constitution's prohibition against discrimination on the basis of sex, Haw. Const. art. I, § 5. Baehr v. Lewin, 852 P.2d 44, 50 (Haw. 1993). The lower courts had rejected the claims on the pleadings without any hearing. *Id.* at

way for same-sex marriages in Hawaii.[202] Although the Full Faith and Credit Clause does not require other states to recognize such marriages, some scholars argued that such marriages should be valid in other states under a reinterpretation of the Full Faith and Credit Clause or under the choice-of-law rules of the states.[203]

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52. The supreme court reversed and vacated, holding that the statute on its face denied same-sex couples legal benefits based on sex and that the discrimination would accordingly have to satisfy the "strict scrutiny" test under the state constitution. *Id.* at 68, *reconsidered in part*, 875 P.2d 225 (Haw. 1993), *appeal after remand sub nom.*, Baehr v. Miike, 910 P.2d 112 (Haw. 1996), *injunction granted*, 96 Daily L.J.D.A.R. 14647 (Haw. Ct. App. 1996). Until that decision, cases from different United States jurisdictions had uniformly refused to permit same-sex marriages and had refused to recognize such marriages celebrated in other jurisdictions. *See generally* Peter G. Guthrie, Annotation, *Marriage Between Persons of the Same Sex*, 63 A.L.R. 3D 1199 (1975 & 1997 Supp.).

[202] From the start, the news media implied that the decision would result in recognition of homosexual marriages and focused on the possible extraterritorial effects of the decision. *E.g.*, Jorge Aquino, *Will Other States Say 'Aloha' to Same-Sex Marriages?*, THE RECORDER, May 10, 1993, at 3 ("If gay and lesbian couples are ultimately permitted to marry in Hawaii, will other states be required to recognize those marriages?"); Michael Gray, *Hawaii Could be First State to OK Same-Sex Marriage*, THE SAN FRANCISCO EXAMINER, Feb. 20, 1994, at A-22 ("Should [Hawaii recognize homosexual marriages], lawyers say it could be the first step in a complete revamping of marriage and family law across the United States, with same-sex couples gaining all the benefits now reserved for heterosexual married couples."); Dennis Lucarelli, *Laws Deny Equal Rights to Gay Couples*," THE SAN DIEGO UNION-TRIBUNE, June 10, 1994, at B-7 ("With this decision, our 50th state has come the farthest along the road toward legal recognition of lesbian and gay marriage. Other states' courts may follow in Hawaii's footsteps, and the Hawaii case could eventually land in the U.S. Supreme Court and achieve historical significance similar to that accorded Brown vs. the Board of Education. . . .").

[203] *E.g*, Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1102 (1994) (arguing "that when courts are faced with the case of a resident couple's same-sex marriage, those courts should follow the better rule of law and validate the marriage. . . . "); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 584-91 (1993-94) (recognizing that states are not now required to accord full faith and credit to recognize marriages from other states under present cases but arguing that full faith and credit should be applied to validity of same-sex marriages celebrated in other states).

Congress responded by enacting the so-called Defense of Marriage Act, which permits states to disregard the legal effects of homosexual marriages celebrated in other states.[204] Mississippi in turn responded with legislation that specifically provides that out-of-state homosexual marriages will not be recognized even if they are valid where celebrated.[205]

Certain legal effects or "incidents"[206] of out-of-state marriages will be recognized even when the marriages themselves are void and accorded no recognition.[207] When a foreign marriage violated a fundamental policy and was prohibited, criminalized, and declared "void" by the express language of the Mississippi Constitution, the Mississippi Supreme Court nevertheless held that the marriage was valid for the limited purpose of determining the surviving spouse's rights of succession to real property in Mississippi.[208]

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[204] The Full Faith and Credit Clause specifically authorizes Congress to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. The official name of the act is the "Defense of Marriage Act." Defense of Marriage Act, Pub. L. No. 104-199, § 1, 110 Stat. 2419 (1996). It provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C.A. § 1738C (1997 Supp.).

[205] Section 93-1-1(2) of the Mississippi Code, amended by Senate Bill no. 2053, approved and enacted February 12, 1997 states:

> Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.

MISS. CODE ANN. § 93-1-1(2) (1997).

[206] Justice Story apparently coined the term "incidents," devoting a separate chapter to "Marriages—Incidents To." STORY, *supra* note 84, ch. 6. at 235. But what Story meant by incidents were the rights or disabilities that arose as a consequence of a valid marriage. He did not suggest that a marriage, invalid under general choice-of-laws principles, would be recognized in other contexts.

[207] Scholars agree that cases tend to show that courts are increasingly willing to recognize the validity of otherwise invalid marriages when to do so would not frustrate local policy. SCOLES & HAY, *supra* note 15, § 13.4, at 434-35; RICHMAN & REYNOLDS, *supra* note 15, § 116[c], at 363-64; WEINTRAUB, *supra* note 133, § 5.1B, at 233. *See In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948) (allowing two wives to share intestate distribution where neither wife disputed other's claim).

The Mississippi Supreme Court has not been receptive to recognizing incidents of marriages that are invalid under both the law of Mississippi and the law of the place where celebrated. *See* Weeks v. Weeks, 654 So. 2d 33, 37 (Miss.

1995) (affirming denial of maintenance to niece who had celebrated void marriage with uncle in North Carolina and subsequently moved with uncle to Mississippi).

[208] *Miller v. Lucks*, 36 So. 2d 140, 141 (Miss. 1948) presented the court with the issue of the recognition of an interracial marriage celebrated in Illinois. The couple had initially lived in Mississippi but were forced to leave the state in order to avoid criminal prosecution for unlawful cohabitation in Hinds County. *Miller*, 36 So. 2d at 141. They moved to Chicago and married in 1939 in Illinois as Illinois residents. *Id.* The wife died intestate owning real property in Mississippi. *Id.*

The Mississippi Constitution at the time provided that "the marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void." MISS. CONST. § 263, *repealed* by legislative action and ratification by electorate December 4, 1987, and invalid under U.S. CONST. amend. XIV. Moreover, interracial marriages were criminally punished as incestuous, as were attempts to evade the prohibition by marrying out-of-state. The relevant statute provided:

> [T]he marriage of a white person and a negro or mulatto or person who shall have one-eighth or more of negro blood . . . shall be unlawful, and such marriage shall be unlawful and void; and any party thereto, on conviction, shall be punished as for marriage within the degrees prohibited by the last two sections; and any attempt to evade this and the two preceding sections by marrying out of this state and returning to it shall be within them.

Miller, 36 So. 2d at 141 (quoting criminal code).

The court concluded, however, that the purpose of the statute was to prevent interracial couples from living together in the state as husband and wife:

> Where, as here, this did not occur, to permit one of the parties to such a marriage to inherit property in this state from the other does no violence to the purpose of Sections 263 of our Constitution and 459 of the Code of 1942. What we are requested to do is simply to recognize this marriage to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi, and to that extent it must and will be recognized.

Id. at 142.

This decision might be discounted as further evidence of the racial animosity underlying the legislation at issue, because it allowed the surviving white spouse to inherit (and divest the local African American heirs). But it is preferable to read it as authority that exceptions to the strong preference for recognizing marriages

4. *Probate and Administration*

a. Wills

In a departure from the practice of other jurisdictions,[209] Mississippi requires foreign wills to be probated in Mississippi courts and treats the probate of foreign wills as an original action.[210] Such an action is independent and may be commenced prior to the commencement of probate proceedings in the state of the decedent's domicile.[211] An authenticated copy of a will admitted to probate in another state or foreign country is admissible as evidence, but the admission of a will to probate in a foreign proceeding is not conclusive,[212] and the validity

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that are valid where celebrated will be applied only when and to the extent necessary to advance the policy behind the exception.

Even when the marriage is *invalid* where celebrated, basic fairness may support an equitable distribution or award of maintenance upon separation. *See Weeks*, 654 So. 2d at 37-38 (Prather & Banks, JJ., dissenting) (carefully reasoned dissent, relying on extensive precedent, arguing persuasively that award to party to void marriage would be both fair and reasonable under the circumstances).

[209] The strong preference for probating a will of movables at the domicile of the decedent gave rise to the practice in some ancillary courts of declining probate until after probate at the domicile, and some authorities even concluded that probate at the domicile was a jurisdictional prerequisite for exercising ancillary jurisdiction, *see* Bailey v. Osborn, 33 Miss. 128, 129-30 (1857) (holding probate court lacked jurisdiction to grant probate of will of nondomiciliary prior to probate in state of domicile). *Contra* Still v. Woodville, 38 Miss. 646, 651-52 (1860) (dictum to the contrary in case where decedent was found to be Mississippi domiciliary). *See generally* SCOLES & HAY, *supra* note 15, § 22.2, at 854-55; STORY, *supra* note 84, § 518, at 890-91.

[210] MISS. CODE ANN. § 91-1-1 (1994). *See generally* ROBERT A. WEEMS, WILLS & ADMINISTRATION OF ESTATES IN MISSISSIPPI §§ 2-55, 3-14 & 7-16, at 88, 102, 174 (1988).

[211] *See* Bolton v. Barnett, 95 So. 721, 724-25 (Miss. 1923) (affirming jurisdiction of chancellor over proceeding to probate will of Tennessee testatrix prior to its probate in Tennessee).

[212] MISS. CODE ANN, § 91-7-33 (1994) provides:

> Authenticated copies of wills proven according to the laws of any of the states of the union, of the territories, of the District of Columbia, or of any foreign country, and affecting or disposing of property within this state, may be admitted to probate in the proper court. Such will may be contested as the original might have been if it had been executed in this state, or the original will may be proven and admitted to record here.

Id. See Estate of Torian, 321 So. 2d 287, 291 (Miss. 1975) (holding that Mississippi and legal effect of the will is determined by Mississippi law.[213]

Testamentary succession of both real and personal property located in Mississippi is governed by Mississippi law even though the decedent died while domiciled in a foreign state.[214] A surviving spouse residing in a foreign state is entitled to a forced share under Mississippi law regardless of the protections afforded by his or her home state.[215] Dispositions of property

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was not required to defer to courts of domicile state on issue of priorities of assets in paying taxes); Gilmore v. Gilmore, 110 So. 111, 114 (Miss. 1926) (holding that beneficiary's acquiescence in Louisiana probate did not estop collateral attack on proceedings in Mississippi); Belt v. Adams, 87 So. 666, 668 (Miss. 1921) ("It is true that a will does not become effective as an instrument of conveyance in this state until it is probated in the state . . . ."); Woodville v. Pizzati, 81 So. 127, 131-32 (Miss. 1919) (holding that Louisiana judgment admitting will to probate was not binding in Mississippi court). *See generally* WEEMS, *supra* note 210, § 3-14, at 102.

[213] In *Heard v. Drennen*, 46 So. 243, 243 (Miss. 1908), two executors named in a will previously admitted to probate in Georgia protested the appointment of a third executor also named in the will on the ground that the third executor was not qualified under Georgia law. The Supreme Court affirmed the appointment of the third executor, holding that the statute permitting probate of authenticated copies of foreign wills was intended only to dispense with proof and that the will, once placed in evidence by authenticated copy, was to be treated just like a Mississippi will. *Heard*, 46 So. at 244. The third executor was properly appointed because he met the qualifications of appointment under Mississippi law by being named in the will. *Id. Accord* Bolton v. Barnett, 95 So. 721, 724-25 (Miss. 1923) (holding that Mississippi law governed surviving spouse's right to renounce will and take forced share in case involving will of Tennessee testatrix).

Although these cases applied traditional conflict-of-laws rules, the result should not vary under the Restatement Second approach. For disposition of land, the result would be the same. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 (1971) (intestate succession of land governed by law of place where land located); *Id.* § 239 (validity of will of land determined by law of place where real property located); *Id.* § 242 (right of surviving spouse to forced share of real property governed by law of place of real property). But, though the Restatement provides for a possibly different result regarding the disposition of personal property, *id.* § 265 (right of surviving spouse to forced share governed by law of state where deceased spouse domiciled at death), Mississippi provides by statute that the widow's right to a forced share in personal property is governed by the laws of Mississippi. MISS. CODE ANN. § 91-1-1 (1994). Though Slaugther v. Garland, 40 Miss. 172, 178-79 (1866), limited this statute to cases of intestate succession, it was effectively overruled by *Bolton*, 95 So. at 725. *See also* Wilson v. Cox, 49 Miss. 538, 543-33 (1873) (holding statute applies in cases of partial intestacy).

[214] Estate of Mason, 616 So. 2d 322, 328 (Miss. 1993).

[215] *Mason*, 616 So. 2d at 328; *Bolton*, 95 So. at 725-26.

are also governed by substantive limitations under Mississippi law, such as the mortmain statute.[216]

Because a foreign will must satisfy Mississippi's statute of wills and other requirements in order to be valid in Mississippi,[217] Mississippi may give effect to a foreign will that is invalid under the law of the testator's domicile. But Mississippi courts may also frustrate a foreign testator's intent by finding that a will, although valid in the testator's home state, is invalid under Mississippi law.[218] A foreign will might also be found valid when the foreign testator's attempt to revoke complied with foreign rules governing revocation but not Mississippi's.[219] To avoid invalidating foreign wills, most states have adopted borrowing statutes that provide for the recognition of wills that are valid under the law of the place where executed or under the law of the place where the testator was domiciled.[220] Mississippi, however, has no such statute.

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[216] *Mason*, 616 So. 2d at 328 (remanding for determination whether bequest to charity exceeded one-third value of estate in violation of mortmain statute).

[217] *See* Belt v. Adams, 87 So. 666, 668 (Miss. 1921) (holding will must be executed in accord with Mississippi law to be probated in Mississippi).

[218] *See generally* WEINTRAUB, *supra* note 133, § 8.13, at 439:

> One of the most objectionable applications of the situs rule is to invalidate, because of lack of requisite formalities, a will that satisfies the formalities indicated by the law of the testator's settled residence where it was executed. In reaching such a result, the situs not only upsets the expectation of the testator and the policy of a sister state . . . but also advances no conceivable interest that it, qua situs, can have.

A foreign will might fail to comply with any number of Mississippi's formal requirements. *See generally* WEEMS, *supra* note 210, §§ 4-4 to 4-14. In addition, the foreign will might be held invalid due to lack of testamentary capacity, *id.* §§ 4-2-4-3, at 110-11, undue influence, *id.* at §§ 8-17 to 8-18, at 196-204, or some other ground under Mississippi law.

[219] This possibility is suggested by *In re Barrie's Estate,* 35 N.W.2d 658, 661-63 (Iowa 1949) (holding under Iowa borrowing statute that will was valid under Illinois law and holding that testator's writing "void" repeatedly on will did not revoke despite fact that will was validly revoked under Illinois law and denied probate in Illinois). *See generally* Roy C. Kuyrkendall, Jr., *Wills—Conflict of Laws—Revocation in a Foreign Jurisdiction*, 21 MISS. L.J. 177, 177-79 (1949) (criticizing decision as inconsistent with legislative intent of Iowa's borrowing statute).

[220] *See generally* John B. Rees, Jr., *American Wills Statutes*, 46 VA. L. REV. 856, 905 (1960) (32 states with statutes borrowing some alternative method of

The Full Faith and Credit Clause requires a probate decision from another state to be recognized when the foreign state was the decedent's domicile and to the extent its judgment determined the rights of property located in that foreign state.[221] The foreign proceedings should also be binding under the Full Faith and Credit Clause to the extent they determined personal rights and liabilities of parties who were actually present in the proceedings.[222] The Mississippi Supreme Court has held that a party who appeared and lost a will contest in another state could not relitigate the validity and effect of the will on personal property located in Mississippi.[223] But rights to real property in Mississippi are not directly affected by probate proceedings in a foreign state.[224]

It is paradoxical that while the Mississippi Supreme Court consistently applies Mississippi law to the validity and legal effect of foreign wills, it holds that the law of the testator's domicile governs matters of construction and interpretation except when it is clear from the will that the testator intended the laws of another jurisdiction to apply.[225] The practice of

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executing valid will). The Uniform Probate Code (adopted by 16 states) provides:

> A written will is valid . . . if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

UNIF. PROBATE CODE § 2-506, 8 U.L.A. 116 (1983). For a discussion of this provision and for an excellent comparison of the Uniform Probate Code with current Mississippi law, see Robert A. Weems & Katherine L. Evans, *Mississippi Law of Intestate Succession, Wills and Administration and the Proposed Mississippi Uniform Probate Code: A Comparative Analysis*, 62 MISS. L.J. 1, 19-20 (1992).

[221] Tilt v. Kelsey, 207 U.S. 43, 60 (1907). Of course, there must have been constitutionally sufficient notice to establish valid in rem jurisdiction. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950).

[222] There is no general probate exception to full faith and credit. *See generally* SCOLES & HAY, *supra* note 15, § 22.3, at 856.

[223] *See* Estate of Waitzman, 507 So. 2d 24, 26-27 (Miss. 1987) (holding that party who appeared and lost will contest in Florida could not contest validity of will again in Mississippi when only personal property was located in Mississippi).

[224] Woodville v. Pizzati, 81 So. 127, 131 (Miss. 1919). *See generally* WEEMS, *supra* note 210, § 8-21, at 206-07.

[225] In *Beauchamp v. Beauchamp*, 574 So. 2d 18, 19 (Miss. 1990), the testator,

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a Wisconsin domiciliary at death, devised real property in Mississippi with a restriction on use that the chancellor held violated Mississippi's prohibition of restraint against alienation under Mississippi law. In his opinion reversing, Justice Pittman explained that the law of the testator's domicile must govern the intent of language employed in his will:

> This court has consistently held that the law of the person's domicile is to be used when construing the provisions of a testator's will, unless it is clear from the instrument itself that the testator intended that the laws of another jurisdiction should control.

Beauchamp, 574 So. 2d at 20. Applying law from Wisconsin, the court held that the word "give, devise and bequeath" established a fee simple, and the restrictions had no legal effect. *Id.* at 22.

The court cited three cases: *Martin v. Eslick*, 90 So. 2d 635, 641 (Miss. 1956), *judgment corrected*, 92 So. 2d 244 (Miss. 1957), *Palmer v. Crews*, 35 So. 2d 430, 434 (Miss. 1948), and *Ball v. Phelan*, 49 So. 956, 967 (Miss. 1909). But a close reading of these cases provides little authority for the court's holding. On the contrary, they may provide support for the view that Mississippi law should apply to resolve ambiguities in wills of land in Mississippi. First, *Martin* did not apply foreign law but merely held under Mississippi law that language that seemed to impose a restraint would be disregarded so as to pass a fee simple. *Martin*, 90 So. 2d at 641. *Palmer* construed a Texas domiciliary's use of the word "royalty" under Texas law not to apply to mineral leases owned in Mississippi and stated the rule that "a will is to be construed according to the laws of the domicile of the testator as to the disposition intended to property in another state, unless it is clear from the instrument itself that he intended that the laws of the latter state should control . . . ." *Palmer*, 35 So. 2d at 434. But the court at the same time applied the rule (under Mississippi law) that required giving effect to a term with a "well-defined meaning," *id.*, and the court proceeded in interpreting another ambiguity in the will to figure out for itself (without recourse to Texas cases) what the testator most likely meant. *Id.* at 436. And, though *Ball* cited approvingly the rule that the *lex domicilii* controls the interpretation of the testator's intention, *Ball*, 49 So. at 967, that opinion limited the rule to the use of technical legal terms or terms given an effect as a rule of law:

> [t]echnical terms, which terms have acquired, in the domicile of the testator, a fixed and unchangeable meaning, thus becoming a rule of property, these terms in such will, in whatever state the will is up for construction, shall be given, in the interpretation of the will, the meaning that would be given them by the courts of his domicile.

Id. at 968. The court looked to Tennessee cases, but in deciding that the testator intended to create a remainder, it used its own judgment (implicitly applying Mississippi law) to draw inferences about the testator's purposes. *Id.* at 969.

I should warn, however, that the rule stated in *Ball* was not only dictum. It was bad dictum. It would seemingly require Mississippi to look behind words here given a specific legal effect in conveying land. There is some general authority for the holding in *Beauchamp* as regards ambiguous words that have no such fixed legal meaning and where the purpose of interpretation is to discover a testator's deferring to foreign rules of construction and interpretation sounds good but makes little sense. It would be better and easier, when the issue is truly a matter of the testator's intent, to apply Mississippi principles of interpretation, as these are the rules best designed to uncover actual intent.[226] The effect of deferring to another jurisdiction's rules of construction (when they differ from the forum's) is to apply a foreign intent-frustrating rule to a matter that Mississippi deems most appropriately resolved by reference to the testator's intent. Such recourse to an intent-frustrating rule makes no sense, except in an unusual case where the foreign intent-frustrating rules were intentionally used in drafting.

In actual practice, when not distracted by arguments about applying foreign standards of interpretation, the Mississippi Supreme Court has properly resolved issues of construction and intent by applying its own principles of interpretation.[227] This Article suggests that the court's practice makes good sense and proposes that Mississippi law should govern all matters of interpretation unless determination of intent is aided by recourse to foreign rules of construction.

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intention. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 251(3) (1934) (language in will of land that is matter of testator's intent should be construed in accordance with law of place testator domiciled when will was made). But there is scant authority for looking to the testator's domicile to determine the effect of conveyancing language with fixed legal meaning. *Id.* § 251(1)-(2).

Furthermore, I question whether even matters of pure intent should be determined by the testator's domicile. The Restatement Second has departed from the rule with regard to land, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 240 (1971) (absent choice-of-law in will, will of land is construed in accordance with the law of the place where land is), but not personal property, *id.* § 264 (absent choice-of-law in will, will of movables is construed in accordance with law of place where testator was domiciled at time of death).

[226] This approach was urged, at least when the language of a will is unambiguous, by Justice Blass, joined by Justices Prather and Dan M. Lee, dissenting in *Beauchamp*, 574 So. 2d at 24 (Blass J., dissenting).

[227] *See, e.g.*, Estate of Mason, 616 So. 2d 322, 330 (Miss. 1993) (holding that gift to predeceased individual lapsed under Mississippi case authority that bequest to named individual was presumed to be individual not class gift absent evidence of contrary intent).

b. Intestate succession

Following the traditional rule that the inheritance of land is governed by the law of the place where the land is located,[228] Mississippi's courts apply Mississippi law to the intestate succession of land located in the state.[229]

Since 1857, Mississippi has also applied Mississippi rules of intestate succession to personal property located in Mississippi.[230] Mississippi's treatment of personal property departs from the common-law rule, followed in every other state,[231] that descent and distribution of personal property are governed by the decedent's domicile at death.[232] An original action must be brought in Mississippi to determine the ownership of personal property located in the state.[233] Cases under the statute have defined personal property broadly to include debts owed by sources located in Mississippi,[234] shares in Mississippi corporations,[235] and deposits in Mississippi banks.[236]

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[228] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 245 (1934) ("The law of the state where the land is determines its devolution upon the death of the owner intestate."); STORY, *supra* note 84, § 483, at 823 ("The descent and heirship of real estate is exclusively governed by the law of the country, within which it is actually situate.").

[229] *See generally* WEEMS, *supra* note 210, § § 1-2, at 3. Mississippi's decision to follow the Restatement Second does not change this rule because it is retained by the Restatement Second:

> Intestate Succession to Land
>
> (1) The devolution of interest in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs.
>
> (2) These courts would usually apply their own local law in determining such questions.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236 (1971).

[230] MISS. CODE ANN. § 91-1-1 (1994):

> All personal property situated in this state shall descend and be distributed according to the laws of this state regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other states, and notwithstanding the domicile of the deceased may have been in another state, and whether the heirs or persons entitled to distribution be in this state or not. The widow of such deceased person shall take her share in the personal estate according to the laws of this state.

Id. There is no legislative history for this statute. It was very likely a reaction to the public controversy over the arguments in the Dred Scott case in 1857 or other similar cases, and was probably designed to assure that slaves in Mississippi would pass in accordance with the pro-slavery laws of the state and not be affected by the property laws of the residence of the decedent's legatees or statutory beneficiaries.

[231] "Mississippi is the only state that doesn't apply domiciliary law to substantive issues of succession [of personal property]." SCOLES & HAY, *supra* note 15, § 22.16, at 880 n.7.

Application of forum law to all property located in the state seems like one of the least objectionable choice-of-law rules. But it produces some of the greatest dilemmas in practice. A debtor deals with foreign administrators at his or her peril, for the payment of a debt construed as property governed by Mississippi law to a foreign administrator provides no defense in a subsequent claim brought in Mississippi by the statutory beneficiaries.[237] Federal interpleader may provide the only remedy.[238] An estate with assets in more than one state may be subjected to irreconcilable conflicts regarding the distribution of property; and Mississippi courts themselves may find it hard to decide whether in disposing of estate assets they should consider the disposition of out-of-state property for purposes of calculating proper shares under Mississippi's rules of descent and distribution.[239] Conflicting rules may also apply to the order of distribution and to priorities of property to be sold to satisfy tax or other obligations.[240]

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[232] STORY, *supra* note 84, § 481, at 818 ("The universal doctrine, now recognized by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death."). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (1971) ("The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death."). The First Restatement provided that upon death, title to all chattels vested in the executor or administrator appointed by the state where the chattels were habitually kept, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 300 (1934), but the Restatement Second returned to Story's rule.

[233] *See* Carroll v. McPike, 53 Miss. 569, 577 (1876) (holding that administration in Mississippi is an original proceeding to be conducted in accord with Mississippi law); Partee v. Kortrecht, 54 Miss. 66, 70 (1876) (holding that personal property distribution should be executed under Mississippi law).

[234] Richardson v. Neblett, 84 So. 695, 697 (Miss. 1920). *See* Jahier v. Rascoe, 62 Miss. 699, 704 (1885) (applying statute to debt incidental to state where "owner of debt" dealt with it so as to establish intent to locate it in state). Rent on Mississippi land is governed by Mississippi law. *Richardson*, 84 So. at 697. But a debt is not necessarily deemed located in Mississippi when owed by a Mississippi resident to a nonresident. Speed v. Kelly, 59 Miss. 47, 54 (1881).

[235] *See* Ewing v. Warren, 109 So. 601, 603 (Miss. 1926) (holding that stock in Mississippi corporation owned by Minnesota domiciliary was located in Mississippi and distribution governed by Mississippi law), Jane v. Martinez, 61 So. 177, 178 (Miss. 1913) (holding that stock in Mississippi bank owned by nonresident was governed by Mississippi law covering exemptions).

[236] *Ewing*, 109 So. 603-04.

[237] *Richardson*, 84 So. at 697.

5. Torts

The first Mississippi case in which the Restatement Second's "most significant relationship" or "center of gravity" approach made a difference was a tort case, *Mitchell v. Craft*.[241] The Restatement Second approach probably continues to make the biggest difference in torts cases. The basic rule in the Restatement Second is misleadingly simple: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."[242] Under this rule, the laws of different states may apply to different issues in the same case.[243]

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[238] *See* 28 U.S.C. §§ 1335, 1397, 2361 (1994); FED. R. CIV. P. 22. But federal courts will not directly administer the estate or probate the will. *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 25, at 160-61 (1994) (discussing probate exception).

[239] *See generally* L.C. Franklin, Jr., Note, *The Conflict of Laws of Descent and Distribution of Property Located in Mississippi*, 12 MISS. L.J. 366, 366-73 (1940) (criticizing Louisiana decision that considered disposition of out-of-state property in applying Louisiana statute to inheritance of real property in Louisiana).

[240] *See* Estate of Torian, 321 So. 2d 287, 293 (Miss. 1975) (holding that property located in Mississippi is governed by forum rules regarding priorities of assets in paying taxes).

[241] 211 So. 2d 509, 513, 515-16 (1968). *See infra* note 245.

[242] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

[243] *See* McDaniel v. Ritter, 556 So. 2d 303, 317 (Miss. 1989) (applying foreign law to all issues except comparative negligence); Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1031 (Miss. 1985) ("[T]he law of a single state does not necessarily control every issue in a given case. We apply the center of gravity

The basic rule is extremely general,[244] and it loses its rule-like character by directing consideration of all the conflicting policies at issue as well as the underlying purposes of the conflict of laws.[245] The Restatement Second was drafted dur-

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test to each question presented, recognizing that the answer produced in some instances may be that the law of this state applies and on other questions in the same case the substantive law of another state may be enforceable."); Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975) (holding Mississippi law governs procedure, Alabama law governs guest statute, and Mississippi law governs negligence on Mississippi roads); Fells v. Bowman, 274 So. 2d 109, 113 (Miss. 1973) (applying Mississippi comparative negligence in accident involving two Mississippi cars in Louisiana but applying Louisiana law to issue of negligence).

[244] The drafters of the Restatement obviously had a guilty conscience, for they conceded the "great generality" of this section and further acknowledged that "the best way to bring precision into the field is by attempting to state special rules for particular torts and for particular issues in tort." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. a (1971).

[245] Section six, referred to in section 145, provides:

> Choice-of-Law Principles
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id. § 6. The list is not exhaustive, nor are the "factors" listed in order of importance. *Id.* § 6 cmt. c.

The Restatement suggests that several of these factors are of less importance in torts than other areas, including the protection of justified expectations and the values of certainty, predictability, and uniformity. The most important factors are thus: the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other states, and ease in determination and application of the law to be applied. *Id.* § 145 cmt. b.

Professor Jackson points out that subsections (a), (e), (f), and (g) are addressed in no Mississippi cases. JACKSON, *supra* note 3, § 4:11, at 4-17 & n.43. In decisions from other Restatement Second jurisdictions, these subsections, when mentioned, have little effect on the result. *E.g.*, Griggs v. Riley, 489 S.W.2d 469, 473 (Mo. Ct. App. 1972).

ing a period of great optimism in balancing tests when specific laws were widely viewed as accommodations of valid conflicting interests. The drafters of the Restatement Second envisaged the choice of law in torts as a comparable judicial balancing of public and private interests.[246]

Contacts to be considered in making the choice-of-law decision in torts cases are the places associated with the parties and with the elements of the tort: the place of the harm; the place of the conduct causing the harm; the place of the domicile, residence, incorporation, and place of business of the parties; and the central place of the parties' relationship.[247] Domicile or residence is determined as of the time of the cause of action, so subsequent changes in residence should not affect the choice of law.[248] For businesses, the principal place of business is more important than place of incorporation,[249] and the fact that a corporation is qualified to do business in Mississippi and has done business in the state unrelated to the issues in litigation "fades into insignificance" in the choice-of-law determination.[250]

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[246] "At least some of the factors mentioned in this Subsection will point in different directions in all but the simplest case. Hence any rule of choice of law, like any other common law rule, represents an accommodation of conflicting values." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971).

The "most significant relationship" language of the Restatement has been much criticized. But its vagueness is a virtue if the purpose of the rules is to empower courts to implement appropriate state policies after carefully considering relevant facts. *Cf.* DAVID F. CAVERS, THE CHOICE OF LAW: SELECTED ESSAYS, 1933-1983 67 (1985) ("The phrase is cryptic, question-begging. Indeed, its question-begging character seems to me its principal virtue as I compare it with its rivals. . . . ").

[247] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971):

> Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

[248] *See* Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1036 (Miss. 1985) ("The suggestion that plaintiffs can change the substantive law according to which a particular action must be adjudicated by changing their citizenship prior to filing suit simply won't wash. The choice-of-law inquiry must relate to the times relevant to the transaction or occurrence giving rise to the claim ab initio. Where the Boardmans lived at the time suit was filed would, however, be rele-

Most issues of liability, vicarious liability, defenses, immunities, and damages are determined by the law selected by the balancing approach,[251] as are claims for contribution and indemnification.[252] The Restatement Second provides more spe-

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vant to the subject matter jurisdictional inquiry . . . ."), *answer conformed to*, 768 F.2d 718 (5th Cir. 1985). *See* JACKSON, *supra* note 3, at § 4:15, at 4-27 ("The Mississippi rule in this circumstance is clear. Post-event changes of domicile do not have choice-of-law significance and so are ignored in choice-of-law analysis."). This is consistent with the suggestion of the drafters of the Restatement Second, who avoided adopting it as a rule. RESTATEMENT (SECOND) OF CONFLICT OF LAWS Introductory Note at 414 ("Presumably, this change of domicile should have no effect upon the law governing most of the issues involving the accident."). *Cf.* Rieger v. Group Health Ass'n, 851 F. Supp. 788, 791 (N.D. Miss. 1994) (giving weight neither to plaintiff's move to Mississippi prior to commencement of action nor to move to another state prior to decision). *But see generally* WEINTRAUB, *supra* note 134, § 6.28, at 346-49 (arguing that after-acquired domicil is relevant for evaluation of state interests and discussing cases that have considered it). Currie went so far as to suggest that a court that granted a dismissal on grounds of forum non conveniens without giving favorable consideration to a plaintiff's residence acquired after the cause of action would violate equal protection. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 573 (1963).

[249] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e (1971).

[250] *Boardman*, 470 So. 2d at 1036, *answer conformed to*, 768 F.2d 718 (5th Cir. 1985).

[251] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 156-72, 174 (1971).

[252] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e, at 421.§ 173 (1971) ("The law selected by application of the rule of § 145 determines whether one tortfeasor has a right to contribution or indemnity against another tortfeasor."); *see also* East Miss. Elec. Power Ass'n v. Porcelain Prods. Co., 757 F. Supp. 748, 751 (S.D. Miss. 1990) (applying Mississippi choice-of-law rules to determine that Tennessee law governed claim for indemnity where parties interested in indemnity issue were Tennessee residents despite fact that tort occurred in Mississippi); Richardson v. Clayton & Lambert Mfg. Co., 634 F. Supp. 1480, 1485 (N.D. Miss. 1986) (applying Mississippi law to claim of Kentucky resident defendant for indemnity from Illinois resident for claims arising from tort in Mississippi), *later proceeding*, 657 F. Supp. 751 (N.D. Miss. 1987).

The result of claims for indemnification can be manipulated by characterizing them either as torts (governed by the tort rules) or as contracts (governed by contract rules). *See generally* JACKSON, *supra* note 3, § 4:9, at 4-13 to 4-14. In addition, actions for quasi-contract might be characterized as procedural and govcific rules to guide the judicial choice. For example, in personal injury actions, the law of the place of injury applies unless some other state has a more significant relationship to the occurrence and the parties.[253] In wrongful death actions, the law of place of death applies unless some other state has a more significant relationship.[254] In actions for injury to land or personal property, the law of place of the injury applies unless some other state has a more significant relationship.[255] In actions for libel and slander, the law of place where the defamatory statements are communicated applies unless some other state has a more significant relationship.[256] Actions for

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erned by forum law, *see supra* note 117, or might be viewed as grounded in a sort of unjust enrichment and governed (under older authority) by the law of the place where the benefit was conferred. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 452-53 (1934).

[253] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971):

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

[254] *Id.* § 175:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Cf. Chapman v. Thrasher Trucking Co., 729 F. Supp. 510, 511 (S.D. Miss. 1990) (quoting Restatement and applying Louisiana law, in action for wrongful death of Mississippi resident killed in Louisiana).

[255] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 147 (1971):

> In an action for an injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence, the thing and the parties, in which event the local law of the other state will be applied.

[256] *Id.* § 149:

invasion of privacy are normally governed by the law of the place where the invasion occurrs.[257] The law of the place of wrongful conduct normally applies in intentional torts arising from interference with marriage,[258] alienation of affections,[259] abuse of process and malicious prosecution,[260] and

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> In an action for defamation, the local law of the state where the publication occurs determines the rights and liabilities of the parties, except as stated in § 150, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

The exception deals with "aggregate" communications—single broadcasts or publications that reach into several sates—which are determined by the state with the most significant relationship. *Id.* § 150(1). For natural persons who are defamed, this place "will usually be the state where the person was domiciled at the time," *id.* § 150(2), and for corporations it will "usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state," *id.* § 150 (3).

Injurious falsehood is governed by the same rules as defamation. *Id.* § 151.

[257] *Id.* § 152:

> In an action for an invasion of a right of privacy, the local law of the state where the invasion occurred determines the rights and liabilities of the parties, except as stated in § 153, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

The exception deals with multistate invasion of privacy by "aggregate" communications in several states by a single broadcast or publication, in which case the law applied "will usually be [the law of] the state where the plaintiff was domiciled at the time if the matter complained of was published in that state." *Id.* § 153.

[258] *Id.* § 154:

> The local law of the state where the conduct complained of principally occurred determines the liability of one who interferes with a marriage relationship, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

[259] There is no specific rule on this, but the commentary to the Restatement states that "alienation of a parent's affections is governed by the same choice-of-law rule as that applicable to an interference with a marriage relationship." *Id.* § 154 cmt. e.

[260] *Id.* § 155:

> The rights and liabilities of the parties for malicious prosecution or

in fraud cases when the detrimental reliance occurs in the same state.[261]

Though they appear to establish presumptions, these more specific rules require a balancing of the competing interests as well as judicial consideration of the underlying purposes of the

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> abuse of process are determined by the local law of the state where the proceeding complained of occurred, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. But cf. Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 341 (5th Cir. 1972) (holding under Mississippi "center of gravity" rule that Mississippi law applied to all issues, including scope of attorney-client privilege, in abuse of process claims involving contempt proceedings in Oklahoma and related litigation in Mississippi).

[261] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(1) (1971):

> When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

When the misrepresentation and reliance occurred in different states, the forum applies the law of the state with the most significant relationship, considering these factors:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
> (b) the place where the plaintiff received the representations,
> (c) the place where the defendant made the representations,
> (d) the domicil, residence, nationality, place of incorporation and place of business of the parties,
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Id. § 148(2).

Accord Vicon, Inc. v. CMI Corp., 657 F.2d 768, 773 (5th Cir. Unit A 1981) (holding under Mississippi choice-of-law rules that Tennessee law governed claim of tortious misrepresentation arising from sale of manufacturing plant in Mississippi to Mississippi resident when alleged misrepresentations were made in Tennessee by defendant's representatives in Tennessee and reliance in form of part payment occurred in Tennessee).

laws.[262] The Mississippi Supreme Court has never placed great weight on the specific rules as tie-breakers in hard choice-of-law cases, though federal cases (supposedly applying Mississippi law) have given decisive presumptive effect to the rules.[263] In *Mitchell* the Mississippi Supreme Court stated that "a case is to be governed by the law of the forum unless it is expressly shown that a different law applies."[264] But in the same opinion, the court suggested: "Ordinarily, the local law of the state where the injury occurred will determine the rights and liabilities of the parties, '*unless* with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.'"[265] But *Mitchell* rightly declined to apply the rule as a presumption when to do so failed to promote Mississippi policies.

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[262] They are likely to have limited effect. For example, in *McDaniel v. Ritter*, Justice Robertson cited section 146, but merely as authority for the proposition that the place of injury is relevant. McDaniel v. Ritter, 556 So. 2d 303, 311 (Miss. 1989). The court noted:

> This is as good a point as any to note that *Mitchell v. Craft* did not declare the place of the accident irrelevant in the choice of law inquiry. The law of that state still controls the rights and liabilities of the parties, unless, with respect to the issue at hand, some other state has a more significant aggregate relationship. Restatement (Second) of Conflict of Laws § 146 (1971).

Id. at 315 n.11. But section 146 did not seem to influence his evaluation of the relevant factors, nor did he give the place of the injury special weight as a contact.

[263] Federal courts supposedly applying Mississippi choice-of-law rules have given far more weight to the Restatement Second rules selecting a place's law to apply absent more significant contacts elsewhere. The conflict between the presumption that forum law should apply and the presumption that the law of the place of the wrong should apply has been interpreted by federal courts to mean that the latter applies in tort cases. *See* Davis v. National Gypsum Co., 743 F. 2d 1132, 1133 (5th Cir. 1984). *See also* Chapman v. Thrasher Trucking Co., 729 F. Supp. 510, 511 (S.D. Miss. 1990) (applying Mississippi choice-of-law rule and citing presumptive rule of Restatement (Second) § 145 to apply law of Louisiana, place of death, in action involving residents from different states arising from death of Mississippi resident); Crouch v. General Elec. Co., 699 F. Supp. 585, 590 (S.D. Miss. 1988) (applying Mississippi choice-of-law rules to select North Carolina law to govern tort claims brought by Alabama resident arising from death in North Carolina). *Cf.* McCain v. Cox, 531 F. Supp. 771, 779 (N.D. Miss.) (Keady, C.J.) (applying Mississippi law to land sale contract among residents from three states for sale of land in Mississippi and elsewhere, stating "we conclude that Mississippi law controls interpretation of the contract. '[I]n case of doubt as to whether the lex loci or the lex fori should govern, the court will naturally prefer the laws of its own state or country.' [Citing Craig v. Columbus Compress & Warehouse Co., 210 So. 2d 645, 649 (Miss. 1968).]"), *aff'd without opinion*, 692 F.2d 755 (5th Cir. 1982). *But see* Cross v. Cummins Engine Co., 993 F.2d 112, 115 (5th Cir. 1993) (observing that trial court applying Mississippi choice-of-law rules had applied Tennessee law to products liability claims by Tennessee residents for injuries sustained in Mississippi where product was manufactured in North Carolina but installed and maintained in Tennessee but not deciding whether choice of Tennessee law was erroneous when no party objected to its application); Beck v. Thompson, 818 F.2d 1204, 1208 (5th Cir. 1987) (holding

The Mississippi Supreme Court has held that Mississippi law determines who may recover in an action for the wrongful death of a Mississippi resident whose estate is administered in Mississippi.[266] So, too, Mississippi law applies in actions for

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under Mississippi choice-of-law rules that Mississippi wrongful death law governed case by Texas resident against estate of Mississippi resident for death that occurred in Arizona); Carney v. United States, 634 F. Supp. 648, 651 (S.D. Miss. 1986) (holding that Mississippi law applied where death occurred in Alabama but negligence occurred in Mississippi, decedent was from Mississippi, and relationship between parties was centered in Mississippi); Perry v. State Farm Mut. Auto. Ins. Co., 606 F. Supp. 270, 274 (S.D. Miss. 1985) (observing presumption in favor of applying forum law, but holding that California law applied to issue of stacking in claims resulting from California resident's accident in Mississippi). *See generally* JACKSON, *supra* note 4, at § 4:20, at 4-31 ("The presumptive rule, which was cited with approval in *McDaniel v. Ritter*, has generally been applied in cases by federal courts applying Mississippi's center of gravity approach to issues of product liability and negligence.") (citing Allison v. ITE Imperial Corp., 928 F.2d 137 (5th Cir. 1991), Walls v. General Motors, Inc., 906 F.2d 143 (5th Cir. 1990), Wright v. Standard Oil Co., 470 F.2d 1280, 1284 (5th Cir. 1972), Bailiff v. Manville Forest Products Corp, 772 F. Supp. 1578 (S.D. Miss. 1991), Raynes v. Hassie-Hunt Trust, 595 F. Supp. 818 (S.D. Miss. 1984)). *See infra* notes 393-99 and accompanying text.

[264] *Mitchell*, 211 So. 2d at 512. *See supra* note 165.

[265] *Id.* at 516, (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971)). *See supra* note 165.

[266] A decedent's son was entitled to recover, applying Mississippi rules, even though the son resided in Louisiana, had been adopted by an adoptive father there, and could not recover under the wrongful death laws of Louisiana. *See* Estate of Jones v. Howell, 687 So. 2d 1171, 1177 (Miss. 1996). This was a hard case because the estranged son of the decedent by a prior marriage (referred to as "natural" in the opinion) recovered to the exclusion of any other family member. *Howell*, 687 So. 2d at 1178. *See also* Warren v. Foster, 450 So. 2d 786, 788 (Miss. 1984) (permitting wrongful death recovery by "son" subsequently adopted in

the intentional torts of intentional interference with contract and insurance bad faith when the tortious conduct occurs in Mississippi even if the parties are nonresidents.[267] On the

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Tennessee, despite claim that child given up for adoption could not inherit under Tennessee law).

The court in *Warren* probably reached the right result but from the wrong direction, reasoning that the statutory beneficiary was entitled to recovery under choice-of-law rules governing intestate succession, citing "the general rule . . . that the law of the place where the property is situated or the law of the decedent's domicile controls the extent or the fact of the right of inheritance." *Warren*, 450 So. 2d at 787. This is inaccurate to the extent that the Mississippi wrongful death statute identifies the proper parties rather than incorporating the laws of intestate succession. MISS. CODE ANN. § 11-7-13 (1991). Moreover, according to the Restatement Second, the preference is for the law of the place of wrongful death (not forum law), and this law can be displaced when another state has other more significant interests. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

Accordingly, it is best to read the Mississippi cases narrowly. Despite the broad language in the opinions, they have in fact applied Mississippi law only when the deaths occurred in Mississippi, when the decedents were Mississippi residents, and when the estates were being administered in Mississippi. There may be cases in the future where decedents reside elsewhere or deaths occur out of state in which the court may appropriately apply foreign law.

In *Nailen v. Ford Motor Co.*, 773 F.2d 94, 96 (5th Cir. 1989), a federal court applying Mississippi choice-of-law rules concluded that a wrongful death action involving nonresidents should be governed by Alabama law because "absent the accident, all of the other contacts in this case point towards Alabama." On appeal, the plaintiff focused exclusively on whether Mississippi's choice of Alabama law should include Alabama's choice-of-law rules. The court correctly held not. *Nailen*, 773 F.2d at 96. But it is questionable whether the choice of Alabama law was right to begin with under Mississippi choice-of-law rules. The tort and death occurred in Mississippi. *Id.* at 95. The parties were not all from Alabama. *Id.* The defendant was incorporated in Delaware but engaged in systematic and continuous business ties in Mississippi as well as Alabama. *Id.* Furthermore, though Alabama might have itself applied Mississippi law (under its *lex loci* conflicts principles), Mississippi might for its part correctly construe the case as a false conflict, for Alabama might have had no interest in having its shorter limitations period applied to bar claims by Alabama residents against non-Alabama defendants.

[267] Valley Forge Ins. Co. v. Strickland, 620 So. 2d 535, 540 (Miss. 1993). This case concerned disputes over coverage for damages suffered by a Louisiana resident's daughter in an accident in Mississippi. The insurer tendered its own policy limits for underinsured motorist coverage. *Strickland*, 620 So. 2d at 537. But the insurer prevented the insured from recovering from the tortfeasor's insurer by refusing to waive subrogation claims. *Id.* at 538. Moreover, the insurer commenced a declaratory judgment action in Mississippi. *Id.* The insured raised the

other hand, the Mississippi actionable word statute does not apply to create a cause of action when the words spoken out of state are not wrongful where spoken.[268] And Mississippi applies the rules of the road of the place of tort in car accident cases.[269]

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intentional tort claims as counterclaims. *Id.*

At trial, the chancellor found that Louisiana law would normally govern the torts but applied Mississippi law under the public policy exception. *Id.* Applying Mississippi law, the chancellor found against the insurer on the subrogation claims and in favor of the insured on the intentional tort counterclaims, awarding $1,000,000 punitive damages. *Id.* The supreme court affirmed but on the theory that Mississippi law governed intentional torts when the wrongful conduct occurred in the state rather than as a public policy exception. *Id.* at 539.

[268] Tattis v. Karthans, 215 So. 2d 685, 691 (Miss. 1968). This opinion cited *Mitchell v. Craft* but apparently thought that its holding was limited to transitory common-law actions. *Tattis, 215 So. 2d* at 690-91. The court's reasoning revealed a curious survival of pre-*Mitchell* ideas of territorially vested rights and relied on a presumption that the Mississippi legislation was intended to take effect only in state:

> In the instant case no action arose in North Carolina under the law of that State, and we cannot create by statute a cause of action for another state. In the absence of a showing of a similar North Carolina statute, no cause of action was created by the words there spoken; in the absence of a cause of action, how can there be a choice-of-law or conflict-of-law problem?
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> Further, our Legislature in adopting . . . [the statute at issue] was interested and empowered to act in reducing crime, preventing violence, and maintaining peace within its own borders, and not within other states, recognizing that such matters were within the province and power of each state.

Id. at 691.

[269] The court has repeatedly stated its adoption of substantive rules of the road of the place of the accident, but it has usually done so in dictum—i.e., in cases where the Mississippi tort rules did not differ significantly. *See* Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975); Fells v. Bowman, 274 So. 2d 109, 113 (Miss. 1973); Turner v. Pickens, 235 So. 2d 272, 274 (Miss. 1970); *Mitchell*, 211 So. 2d 509, 513 (Miss. 1968). *See generally* JACKSON, *supra* note 3, § 4:18, at 4-30 ("The general rule . . . is that a state where an automobile accident occurred should have its 'rules of the road' applied."). The Fifth Circuit, applying Mississippi choice-of-law rules, concluded that Mississippi law should determine whether a foreign resident mother's right to recover for injuries to her son suffered in Mississippi should be reduced by the comparative negligence of the victim's father. Wright v. Standard Oil Co., 470 F.2d 1280, 1285-86 (5th Cir. 1972). But the court did so because it concluded the residence of the parties was not important when the policy of the foreign statute limiting recovery was not to protect the marital

Although it has not differentiated explicitly between rules that regulate conduct and those that merely shift losses, the Mississippi Supreme Court, deciding cases involving the effect of loss-allocating rules in out-of-state accidents, has given more weight to the parties' residence when all reside in the same state than to the place of the accident or tortious conduct.[270] Hence Mississippi's comparative negligence statute applies to out-of-state accidents when all the parties are from Mississippi.[271] So, too, Mississippi law rather than foreign guest statutes applies in cases between Mississippi residents involved in out-of-state car accidents.[272] Such results make good sense,

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relationship and because Mississippi would prefer forum law as qualitatively better. *Wright,* 470 F.2d at 1285-86.

[270] The cases involve conflicts between comparative and contributory negligence and guest statute defenses. The Mississippi Supreme Court itself has not relied on a distinction between tort rules designed to reduce risks of injury and those that are designed to shift losses. The distinction between risk-reducing and loss-allocating rules has become popular in conflict-of-laws theory in the wake of interest analysis theory. But it should be noted that the distinction is dubious, because every loss-allocating rule that prevents recovery provides an incentive (in theory) for the potential plaintiff to take steps to reduce the risk of injury. Even guest statutes (in theory) give passengers a greater incentive to travel with safe drivers.

It will also be noted that guest statutes and contributory negligence have other features in common besides the fact that they might be characterized as loss-shifting rules. Both doctrines declined markedly during the twentieth century and are now in disfavor among both courts and scholars.

[271] *See* Fells v. Bowman, 274 So. 2d 109, 112-13 (Miss. 1973) (applying Mississippi comparative negligence in accident involving two Mississippi cars in Louisiana but applying Louisiana law to issue of negligence); *see also* Mitchell v. Craft, 211 So. 2d 509, 514 (Miss. 1968) ("The comparative negligence statute of this State has been effectively administered for many years and we have an interest in applying it to Mississippi residents."); *see supra* note 168.

[272] *See* Turner v. Pickens, 235 So. 2d 272, 274 (Miss. 1970) (applying Mississippi law and rejecting guest statute defense in personal injury actions arising out of single-car accident in Illinois where all parties were Mississippi residents). The court affirmed the trial court's application of Mississippi law, concluding that the result was required by the holding of *Mitchell v. Craft,* without addressing the fact that the legal issue in *Mitchell* had been comparative negligence:

> In applying the law of this state the trial court correctly followed our holding in Mitchell v. Craft [citation omitted] wherein we modified the pre-existing rule which invariably applied the law of the place of injury and held that under factual situations such as in this case, the most substantial relationship of the parties and the dominant interest of the

for the residence of the parties is an important indicator of the strength of the state's interest behind the laws in conflict. For example, when parties are from Mississippi, the purposes of the foreign state's guest statute would probably not be served by applying it in litigation in Mississippi involving Mississippi residents.[273] In contrast, the compensatory purposes behind Mississippi's tort law would be frustrated unnecessarily by allowing the defense.[274]

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forum required the application of Mississippi law.

Turner, 235 So. 2d at 274.

[273] It is not clear what the purposes of guest statutes are, but under the Restatement Second and other modern choice-of-law approaches, foreign states are required to figure out the policies behind a statute that a state that enacted the statute would itself rarely if ever identify. If the general policies of the guest statute are to prevent fraudulent litigation in the legislature's own state court system, then Mississippi's disregard of the guest statute obviously would not frustrate the legislative purpose behind the statute. Other state courts have rejected application of foreign guest statutes in cases involving their own residents by concluding more problematically that the purpose of the statutes was to provide a defense only for resident defendants of the legislating state or that the legislating state had no legitimate interest in providing a defense to foreign resident defendants. *See* Tooker v. Lopez, 249 N.E.2d 394, 398-99 (N.Y. 1969) ("Michigan has no interest in whether a New York plaintiff is denied recovery against a New York defendant where the car is insured here."). This practice of limiting foreign interests to the protection of foreign residents is consistent with some scholarly theories of choice of law, notably Currie's theory of governmental interest analysis, *see supra* text at note 161, but it is objectionable on theoretical grounds because it encourages states to disregard the actual *law* of other states in search of their constructive *interests*, and on practical grounds because it is uncertain and discriminatory in its application. *See generally* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 78, 232 (1991). *But see generally* Herma Hill Kay, *"The Entrails of a Goat": Reflections on Reading Lea Brilmayer's Hague Lectures*, 48 MERCER L. REV. 891, 907-14 (1997) (criticizing Brilmayer's critique of interest analysis).

[274] Though the Mississippi courts have never announced a formal rule, Professor Jackson constructs a general rule from the cases: "[T]he general rule is that where all parties are domiciled in a single state, that state's law controls on loss distribution rules." JACKSON, *supra* note 3, § 4:19, at 4-30. But this may be an overgeneralization. While Mississippi's law generally applies in cases involving Mississippi parties (when the foreign state has no interest in application of its law), it is not certain that foreign law should apply to cases arising in Mississippi involving nonresidents. Indeed, there is some authority to the contrary. *Cf.* Wright v. Standard Oil Co., 470 F.2d 1280, 1285 (5th Cir. 1972) (applying Mississippi law to issue of whether mother's right to recover for son's injuries were reduced by husband's comparative negligence where all plaintiffs were foreign

The parties' domicile is given less weight, however, when the parties are actually living in another state and the center of their activity and relationship is in that other state. Thus a common-law tort claim was barred under Louisiana law when the employee, though a resident citizen of Mississippi, was living in Louisiana at the time of his employment, was hired in Louisiana, worked exclusively in Louisiana, and was injured and treated in Louisiana.[275] The defendant employer was incorporated in Mississippi but was doing business in Louisiana as well as Mississippi and paid insurance premiums in Louisiana.[276]

Normally Mississippi law should apply to cases arising in Mississippi.[277] Traditionally, such cases would not have been considered to require a choice of law, and even under the Restatement Second, the law of the place where the tort occurred usually applies.[278] Mississippi has powerful state interests in

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residents).

[275] White v. Malone Properties, Inc., 494 So. 2d 576, 577, 578 (Miss. 1986).

[276] *White*, 494 So. 2d 577, 580-81 (facts stated by both majority and dissenting opinions). The majority explained that Louisiana law applied because "it is obvious from the facts . . . that Louisiana has 'the most substantial relationship' to the action," and cited pre-*Mitchell* cases. *Id.* at 578.

Justice Robertson concurred, objecting to the use of pre-*Mitchell* authority, *see supra* note 173, but finding "[a] balance of these significant contacts makes it apparent that Louisiana furnishes the center of gravity." *Id.*, at 581 (Robertson, J., concurring); *see also* Gann v. Fruehauf Corp., 52 F.3d 1320, 1325 (5th Cir. 1995) (applying Mississippi choice of law rules and holding that Washington law should apply in wrongful discharge tort action when plaintiff had been resident in and employed by defendant in Washington for several years and until three years before termination).

[277] In cases where the accident occurs in Mississippi, both of the rules of presumption identified in *Mitchell v. Craft*—forum law and the law of the place of the harm—indicate that Mississippi law should apply. *See supra* notes 114, 262.

[278] *See supra* notes 253, 269. *But see* Nailen v. Ford Motor Co., 873 F.2d 94, 96 (5th Cir. 1989) (applying Alabama law in wrongful death action arising in Mississippi). *Nailen* is bad authority for Mississippi choice of law because Alabama law should probably not have applied. But for some reason the parties agreed at trial that Alabama law governed the case. *Nailen*, 873 F.2d at 96. The plaintiff's only argument (both, at trial and on appeal) was that Alabama's whole law (including its choice-of-law rules which picked Mississippi law) should apply. *See* Nailen v. Ford Motor Co., 690 F. Supp. 552, 554 (S.D. Miss. 1988), *aff'd by* Nailen v. Ford Motor Co., 873 F.2d 94, 96 (5th Cir. 1989). The courts did not engage in a judicial choice-of-law, and the opinion's references to the Restatement

applying its law to control the consequences of acts committed within its territorial jurisdiction and to assure that its laws apply equally to events caused in the state regardless of the residence of the actors who caused the events.[279]

It must be conceded that inapposite language in one supreme court opinion seems to state that the Alabama guest statute should apply to a claim by an Alabama resident against another Alabama resident stemming from a truck accident in Mississippi.[280] But the statement in that opinion (repeated

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Second are pure (and erroneous) dictum.

[279] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). *See supra* note 277.

[280] Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975). In *Vick* a truck driver gave his brother-in-law a ride for personal reasons, knowing that his employer lumber company's policy prohibited riders. *Vick*, 316 So. 2d at 245. The plaintiff passenger, injured in Mississippi, brought personal injury actions against the driver for negligent driving and against the lumber company for negligent maintenance and loading of the truck. *Id.* at 244. The company's alleged negligence took place in Alabama. *Id.*

This case has been read as authority for the broad proposition that Mississippi applies the law of common domicile. *See* JACKSON, *supra* note 3, § 4:19, at 4-30. But a close reading of the case shows that the exact meaning of its holding is far less certain.

From the start, *Vick* was influenced by the supreme court's erroneous assumption that it lacked authority to dismiss under the doctrine of forum non conveniens. *Vick*, 316 So. 2d at 245. *Cf.* Missouri Pac. R.R. Co. v. Tircuit, 554 So. 2d 878, 881 n.1 (Miss. 1989) (criticizing *Vick* opinion's treatment of forum non conveniens). The court also confused factors (like the number of witnesses in Alabama) that would be relevant for dismissing but irrelevant to choice of law.

Moreover, the opinion's reasoning is in marked conflict with its holding. While the court broadly stated that Alabama law applied to everything except the rules of the road and the statute of limitations, the only issue to which the court applied Alabama law was the passenger's claim against the driver's employer based on its alleged negligence in Alabama:

> In the case now before the Court, the "center of gravity or of most substantial relationships" unquestionably is in Alabama, since the place of the accident was purely fortuitous and Mississippi's sole relation to the occurrence was, as was said in Mitchell, "purely adventitious." Not only do all of the parties, plaintiffs and defendant, and nine of the ten witnesses, reside at Hamilton, Alabama, but their status, and their relationships each with the other, were established under agreements, express or implied, arrived at in the State of Alabama. The interstate trip on which they were engaged began and was to end in the State of Alabama. The loading, securing and weighing of the shipment took place at

out of context in the headnote) is dictum at best, because the issue presented to the court was not the application of the Alabama guest statute but rather the driver's employer's liability for acts performed in Alabama. Despite the dictum and headnote, the court actually applied Mississippi law and not the Alabama guest statute to the claims against the Alabama driver.[281] The opinion offers no complete explanation for why Alabama law should apply to the separate claims against the driver's employer, but the facts disclose that the passenger connived with the driver to obtain a ride in violation of the employer's policy. The important point is that the opinion does not suggest that Mississippi has no policy in favor of compensating nonresidents injured in the state. On the contrary, Mississippi policy favors application of Mississippi law to in-state accidents, including those involving foreign residents.[282] More-

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> Hamilton. We have concluded that Alabama law, including the Alabama "guest statute," should govern as to all aspects of the case excepting that (1) Mississippi rules of the road should apply to questions of alleged negligence in the actual driving of the truck and (2) the period of limitations, by ancient precedent, is governed by the law of the forum.

Vick, 316 So. 2d at 246. The basic claim against the driver was resolved under Mississippi law and not under Alabama's guest statute, despite the fact that the guest statute is hardly a rule of the road (Professor Jackson properly classifies it as a loss distribution rule, JACKSON, *supra* note 3, at § 4:19). Moreover, without recognizing any inconsistency, the court proceeded to rely also on Mississippi cases in concluding that the lumber company owed an uninvited guest of its employee no more than a duty to avoid injuring him willfully or wantonly. *Vick*, 316 So. 2d at 248.

[281] The court affirmed the judgment against the truck driver supported by simple negligence according to Mississippi law, disregarding any possible guest statute limitation: "In this situation, as to [the truck driver], [the plaintiff] was not a trespasser and proof of simple negligence on the part of [the truck driver], which proximately contributed to [plaintiff's] injury, was enough to require that the issue be submitted to the jury as to [the truck driver's liability]." *Id.* at 249.

[282] There is little reason to suppose that either the deterrent or compensatory policies behind the Mississippi law of torts apply with less force to foreign resident plaintiffs. Older Mississippi cases did not distinguish between parties on the basis of their residence. On the contrary, a statutory right was assumed to extend to a nonresident when the statute did not clearly limit its application. *Cf.* Bolton v. Barnett, 95 So. 721, 726 (Miss. 1923) ("This statute does not give the right of renunciation to only citizens of this state, but gives it to any husband or wife upon the probate of the will of the deceased."). *See also* MISS. CONST. § 24 ("[E]very person for an injury done him in his lands, goods, person, or reputation,

over, there are reasons to question whether applying Mississippi law in such cases conflicts with the policies of the residents' home state.[283]

Courts have struggled with cases arising out of state where the parties reside in different states. For example, the Fifth Circuit (applying Mississippi choice-of-law rules) held that

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shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.").

Against the arguments based on policy must be reckoned Judge Barksdale's observation that "decisions subsequent to *Mitchell* appear to have given little, if any, actual weight to the policy considerations in § 6." Allison v. ITE Imperial Corp., 928 F.2d 137, 141 (5th Cir. 1991). *See generally* JACKSON, *supra* note 3, § 4:11, at 4-17 (critical of lack of Mississippi supreme court's attention to policy issues). But where the accident occurs in state, the presumptive rules and "contacts" further support application of Mississippi law. *But see Nailen*, 873 F.2d at 96 (applying Alabama law in wrongful death action arising in Mississippi suggesting that residence contacts outweighed accident contact). *Nailen* is bad authority for the reasons set forth *supra* note 278.

[283] For example, it is doubtful that Alabama had any state interest in applying its guest statute to litigation arising from an accident in Mississippi. Alabama would apparently have applied Mississippi law under its rule of *lex loci delicti*. Etheredge v. Genie Indus., Inc., 632 So. 2d 1324, 1326 (Ala. 1994), Fitts v. Minnesota Mining & Mfg. Co., 581 So. 2d 819, 820 (Ala. 1991). Although looking to Alabama's choice-of-law law at first seems to be a species of renvoi that is discouraged, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(1) (1971), the purpose of the analysis is not to reach the same result as Alabama but rather to weigh the strength of the Alabama policy in conflict with Mississippi's, which is permitted, *id.* § 8 cmt. k. *See generally* John David Egnal, *The "Essential" Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law*, 54 TEMPLE L.Q. 237 (1981) (supporting consideration of foreign choice-of-law rule to reveal lack of foreign interest in case). *But see* Arthur Taylor Von Mehren, *The Renvoi and Its Relation to Various Approaches to the Choice-of-Law Problem*, *in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 380, 393-94 (Kurt H. Nadelmann et al. eds., 1961) (arguing that *lex loci* jurisdiction's choice-of-law rule does not identify its state interest).

Applying the Restatement Second, the Missouri Court of Appeals rejected a foreign guest statute defense that was raised in an accident that occurred in Missouri. Griggs v. Riley, 489 S.W.2d 469, 472 (Mo. Ct. App. 1972). Applying Missouri law rather than the law of the parties' domicile, the court specifically relied on the fact that the defense would not have been applied by the domiciliaries' home court. *Griggs*, 489 S.W.2d at 474 (court stated that "the interest of Illinois in that policy [behind the guest statute] has always extended only to its borders."). *But see Nailen*, 873 F.2d at 96 (applying Alabama law in wrongful death action arising in Mississippi and rejecting arguments that Alabama would not apply its own law).

Tennessee law barred products liability claims by a Mississippi resident and his Mississippi employer brought against a Pennsylvania manufacturer for injuries sustained by the employee during temporary work in Tennessee.[284] In a medical malpractice claim between foreign residents in a foreign state, a federal trial court (applying Mississippi choice-of-law rules) held that Mississippi comparative negligence applied but that recoverable damages were reduced by foreign limits on noneconomic damages.[285]

There is no better illustration of the complex analyses of interests and contacts required by the Restatement Second than Justice Robertson's opinion in *McDaniel v. Ritter*,[286] a wrongful death action brought by the survivors and personal representatives of a passenger, Ritter, killed in a plane crash.[287] Ritter was a Mississippi resident as were his surviving spouse and heirs.[288] He was employed by a Mississippi corporation having its principal place of business in Tennessee.[289] The pilot, Speaks, was a Tennessee resident but was a native of Mississippi and was engaged in extensive property and business activities in Mississippi.[290] Ritter and Speaks were sales representatives covering a multistate territory for various firms (some owned by Speaks). Ritter's and Speaks's base of operations was in Memphis.[291] Both were pilots but Speaks was far more experienced.[292]

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[284] *Allison*, 928 F.2d at 139-45. The court, after careful consideration of section 145 contacts and section 6 considerations, concluded that Tennessee had a strong interest in requiring litigation of products liability claims within a reasonable time and reducing manufacturers' costs. *Id.* at 144. The court also suggested that Mississippi had policies in favor of permitting recovery for residents. *Id.* But the court did not find that Mississippi's interests were greater than Tennessee's and applied Tennessee law as the place of the injury. *See supra* note 90.

The case is questionable authority for Mississippi, however, because (as in other federal cases) the Fifth Circuit gave decisive effect to the presumptive application of *lex loci delicti*, which does not apply to statutes of limitations and which the Mississippi Supreme Court has not found dispositive in any case. Moreover, the Fifth Circuit's evaluation of contacts and factors is problematic. For example, it gave special attention to § 6(g): "Applying the Tennessee statute of repose will result in § 6[(g)] 'certainty, predictability and uniformity of result,' and promotes important state policies." *Allison*, 928 F.2d at 144. According to the Restatement itself, however, section 6(g) is inapplicable in torts. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i; § 145 cmt. b; *see infra* note 245. So, too, it gave weight to Tennessee's policy of avoiding stale claims, but concluded that state policy arguably had no importance in another state — especially in Mississippi where all matters of evidence were governed by forum law.

Interest analysis theorists would probably object that the Tennessee state interests identified by the Fifth Circuit were largely conjectural in a case involving application of the statute of repose to a nonresident. Mississippi's policies in contrast were substantial, and application of Tennessee's statute of repose completely frustrated Mississippi's policies of compensation, while application of Mississippi's statute of limitations to claims involving Mississippi residents injured by products manufactured outside Tennessee would not frustrate the general purposes of Tennessee's statute of repose.

[285] Rieger v. Group Health Ass'n, 851 F. Supp. 788, 791-93 (N.D. Miss. 1994) (Davidson, J.).

[286] 556 So. 2d 303 (Miss. 1989).

One day Speaks and Ritter rented a small plane in Memphis and flew to Springfield, Missouri on business. Later that day, after completing their business, they planned to fly to a nearby town in Missouri for a social visit to Speaks's in-laws. Speaks failed to get a full weather briefing, and the plane experienced icing and crashed in Missouri.[293]

Ritter's survivors asserted claims against Speaks's estate for negligence and against various owners and operators of the plane on theories of strict vicarious liability.[294] The defendants raised the defenses of assumption of risk, the barring of tort recovery by Tennessee workers' compensation law, and the lack of vicarious liability under Tennessee law.[295]

The trial court initially viewed the case as one of pure assumption of risk due to Ritter's own experience as a pilot.[296] The court refused to apply Mississippi comparative negligence and submitted the issue of assumption of risk to the jury, which returned a verdict for the defendants.[297] The trial court subsequently granted a motion for a new trial, concluding that it had erred, and the supreme court agreed that assumption of risk was unavailable.[298] To reach this conclusion it was unnecessary to make a choice-of-law determination because the laws of Tennessee, Mississippi, and Missouri were not in conflict on the issue of assumption of risk.[299] Justice Robertson hinted, however, that Missouri law, might apply to this issue.[300] Employing a sort of renvoi, he reasoned that Tennessee law applied under Mississippi's Restatement Second approach and that Tennessee law, which retained the rule of *lex loci delictus*, would itself apply Missouri law.[301]

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[287] *McDaniel*, 556 So. 2d at 304.

[288] *Id.* at 305.

[289] *Id.* at 311.

[290] *Id.* at 308-09. Much of Speaks's activity in Mississippi was unrelated to the case but was sufficient to establish general jurisdiction. *Id.* at 309.

[291] *Id.* at 305.

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] *Id.* at 311, 313, 314.

[296] *Id.* at 309.

But the supreme court nonetheless held that the trial court erred in applying Mississippi law to all the legal issues in the case.[302] Looking at the contacts, Justice Robertson concluded that Tennessee had the most significant relationship with the occurrence and that Mississippi law could not govern all issues.[303] He analyzed each issue separately, holding that Ten-

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[297] *Id.* at 305-06. The trial court had granted a motion for a new trial, but the supreme court granted the defendants' petition for interlocutory appeal. *Id.* at 306. Three justices dissented from the decision to grant the appeal. *Id.* at 317-18 (Hawkins, P.J., dissenting).

[298] *Id.* at 316.

[299] The defendant argued that the plaintiff's decedent, a trained pilot, assumed the risk by flying under hazardous weather conditions. *Id.* at 315. Under the specific facts, including alleged continuing negligence by the pilot, the defense was not available under the law of Missouri, Tennessee, or Mississippi. *Id.* at 315-16.

[300] *Id.* at 315.

[301] The court stated:

> *Mitchell v Craft* and progeny again mandate that we seek Tennessee law, but when we do so we find a Tennessee choice of law rule that mandates enforcement of the law of the state where the accident occurred, the old lex loci rule, if you will. [Citations omitted.] The accident occurred in Missouri. That a Tennessee court would likely enforce a Missouri law does not control us; it is but a factor.

Id. Of course this statement is purest dictum, inconsistent with the Restatement Second's own attempt to eliminate renvoi, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 8(1), 187(3) (1971).

[302] *McDaniel*, 556 So. 2d at 311.

[303] Justice Robertson wrote:

> Both in number and significance, the relevant "contacts" considered as a

nessee law applied and provided complete defenses to claims based on vicarious liability against the various owner-operator defendants,[304] that Tennessee law applied to the issue of the exclusivity of workers' compensation, but that Tennessee law did not bar a tort claim.[305]

Despite the fact that Tennessee law applied to most of the issues in the case, the court held that Mississippi comparative negligence should apply to the tort claim.[306] First, Justice

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> whole suggest without serious doubt that, vis-a-vis Mississippi or Missouri, Tennessee is the state with the most significant relationship to the occurrence and the parties.
>
> The Circuit Court erred when it held Mississippi law applicable to all issues in the case.

Id.

[304] *Id.* at 311-12:

> Our first substantive question is whether [defendants] may be held liable vicariously for damages occasioned by [pilot's] neglect. The place of the accident and the tortious conduct, i.e., Missouri, is certainly relevant [citations omitted]. If the party injured or killed had been a Missourian, that state's law would control [citations omitted]. We find a distinct and predominant Tennessee flavor emanating from the ownership, management, maintenance, lease and operation of the aircraft, and, as well, the Tennessee contacts noted above. On these facts one may but conclude that Tennessee law controls this particular issue. [Citation omitted]. The lone Mississippi contact with this issue is the presence of a Mississippi resident in the passenger's seat. This is not enough.

The holding in *Hanley v. Forester*, 903 F.2d 1030, 1034 (5th Cir. 1990), is not inconsistent. Applying Mississippi choice-of-law rules, the federal court held that Florida law governed the issue of a Mississippi resident's vicarious liability for the injuries caused by his son to a Louisiana resident in a car accident in Florida. *Id.* at 1033-34. The court may have reached the right result but for the wrong reasons. In relying on Florida's purportedly "strong policy considerations regarding safety on its highways" behind its owner-liability law, *id.* at 1033, the Fifth Circuit did not realize that application of this law probably had little effect on highway safety and was rather a loss-allocation rule. Nevertheless, under Justice Robertson's reasoning in *McDaniel*, it may make sense to apply the law of the place of the wrong to loss-allocation issues when parties do not share a common domicile.

[305] The court looked to Tennessee workers' compensation legislation under which the statutory remedy excluded tort liability. *McDaniel*, 556 So. 2d at 313. But the court applied Tennessee law in concluding that the Ritter and Speaks were engaged in a "frolic" outside the scope of employment at the time of death. *Id.* at 314. The court also observed that Tennessee and Mississippi law did not conflict on this point. *Id.* at 314 n.9.

[306] *Id.* at 316-17.

Robertson emphasized the strength of Mississippi's policy preference for comparative negligence.[307] Second, he questioned the strength of Tennessee's policies behind the doctrine of contributory negligence.[308] Third, he cited the line of Mississippi cases applying comparative negligence in out-of-state accidents.[309] Fourth, he observed that comparative negligence was "demonstrably superior" to contributory negligence on objective grounds of both civil justice and economic efficiency.[310] Fifth, he pointed out that Missouri also adopted comparative negligence and that Missouri law would normally apply as the state where fault and injury occurred, absent a more significant relationship with another state.[311] For all these reasons, but without specifically relying on the Mississippi residence of Ritter or his survivors, Justice Robertson concluded that Mississippi comparative negligence must apply.[312]

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[307] *Id.* at 317. At first, he justified this preference for comparative negligence in language that looked like a public policy exception to the choice-of-law rules of the Restatement Second. *See id.* at 316 ("Notwithstanding that another state may have the most significant relationship to a given issue, we have expressed our reluctance to enforce the law of that state where such would be offensive to the deeply ingrained or strongly felt public policy of this state."). *See infra* notes 371-88. But he further explained that this result was consistent with the Restatement Second's direction to weigh the policies of the forum as well as with the application of qualitatively better rules that was described (or advocated) by certain scholars:

> In Restatement parlance we act by reference to the "relevant policies of the forum" and the "basic policies underlying the particular field of law." Restatement (Second) of Conflict of Laws § 6(2)(b) and (e) (1971). Prof. Robert A. Leflar's more brazen form of expressing the point would be that we enforce our comparative negligence rule because it is a "better rule of law," cited in *Mitchell*, 211 So. 2d at 514; *see* [Robert A.] Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584, 1587 (1966); *see also* [Alfred] Hill, *The Judicial Function in Choice of Law*, 85 Colum.L.Rev. 1585, 1618-19 (1985).

McDaniel, 556 So. 2d at 316 n.13.

[308] *Id.* at 316-17. Justice Robertson noted, without giving any weight to, the fact that Tennessee enforced Mississippi's comparative negligence statute in a conflicts case. *Id.* at 317 n.14. He suggested Tennessee courts may have preserved contributory negligence for reasons having nothing to do with their commitment to policies behind the rule: "Perhaps the Tennessee courts similarly recognize that comparative negligence is the better rule, believing only that implementation of the new regime is not within the judicial prerogative." *Id.* The Tennessee Supreme Court subsequently adopted comparative negligence in a decision that both confirmed Justice Robertson's suspicion that Tennessee lacked a strong commitment to contributory negligence and refuted his suggestion that the Tennessee courts were powerless to adopt comparative negligence. McIntyre v. Balentine, 833 S.W.2d 52, 56 (Tenn. 1992).

[309] *McDaniel*, 556 So. 2d at 317 (citing Fells v. Bowman, 274 So. 2d 109, 112-13 (Miss. 1973); Mitchell v. Craft, 211 So. 2d 509, 513-16 (Miss. 1968)).

[310] *McDaniel*, 556 So. 2d at 317.

Justice Robertson's analysis demonstrates the importance of case-specific consideration of contacts and issue-by-issue evaluation of state policies. It also reveals the difficulty of applying the Restatement Second approach and the uncertainty that remains[313] in many areas of torts[314] despite the judicial attention lavished on choice-of-law problems.[315]

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[311] *Id.*

[312] *Id.*

[313] Justice Robertson's opinion in *McDaniel* raises many new questions: 1) When Mississippi choice-of-law rules select the law of another state, does Mississippi look to the whole law, including the choice-of-law rules, of that other state?; 2) Does Mississippi's application of comparative negligence in out-of-state accidents extend to nonresidents?; 3) How important is the "business base" or center of a relationship when the parties travel elsewhere pursuant to their business or their relationship?; and 4) Is the geographical center of a relationship or business activity important because of that place's interest in controlling extraterritorial aspects of the relationship, because the parties expected its law to govern, or because of some intuitive sense of *lex loci*?

[314] It remains uncertain how far the rulings developed in guest statute or comparative negligence cases should extend to different areas. And even some of the simplest cases involving guest statutes or contributory negligence are not clearly controlled by precedent. Examples include a Mississippi guest injured by a foreign host in a foreign guest-statute state; a foreign guest injured by a Mississippi host when a guest statute provides a defense under the plaintiff's home law; a Mississippi victim partly at fault injured by a foreign defendant in defendant's home state when that state provides a defense of contributory negligence; a foreign plaintiff injured in Mississippi by a Mississippi tortfeasor when the plaintiff's home state provides a complete defense of contributory negligence.

[315] For example, though federal courts are required to decide a conflicts case as would a Mississippi state court, federal courts have routinely avoided the comprehensive analysis of facts and interests made by Justice Robertson and have instead routinely applied the law of the place of the crash in most airplane tort cases. *See* Crouch v. General Elec. Co., 699 F. Supp. 585, 590 (S.D. Miss. 1988) ("[T]he undisputed place of the injury is North Carolina. Hence, North Carolina substantive law applies."); *see also* Cochran v. Rockwell Int'l Corp. 564 F. Supp. 237, 242 (N.D. Miss. 1983); McAlpin v. James McKoane Enters., Inc., 395 F. Supp. 937, 940 (N.D. Miss. 1975). *But see* Beck v. Thompson, 818 F.2d 1204, 1208 (5th Cir. 1987) (applying Mississippi law since foreign state "had no rela-

6. *Contracts*

Frequent references to Mississippi's choice-of-law approach as a "center of gravity" or "most substantial relationship" approach may give rise to the misconception that choice of law in contracts is governed by the same sort of judicial balancing made in torts cases. But the treatment of contracts is different.[316] First, choice-of-law issues that arise in contracts within the Mississippi version of the Uniform Commercial Code are governed by statute, not by the judicially adopted rules of the Restatement Second. Second, both the Uniform Commercial Code and the Restatement Second incorporate a strong preference for applying the law chosen by the parties. Accordingly, contracts choice-of-law cases are resolved by judicial balancing only for contracts that are neither governed by the Uniform Commercial Code nor controlled by a valid choice of law made by the contracting parties.

a. *Uniform Commercial Code*

The Uniform Commercial Code allows parties to make a choice of law of any state or country that has a "reasonable relation" to the transaction.[317] If the parties make no choice, the Uniform Commercial Code applies "to transactions bearing an appropriate relation to this state."[318] Regardless of any

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tionship with the claim apart from the tortious circumstance that the aircraft crashed there").

[316] *See* Estate of Lawrence Thomas Jefferson, No. 95-CA-00226 COA, slip op. at 7 (Miss. Ct. App. Jan. 30, 1996) (not designated for publication and may not be cited pursuant to MISS. R. APP. P. 35-B) ("The 'most significant relationship rule' enumerated in *Mitchell* does not apply to the issues in the case *sub judice* because here we deal with contract law—and not tort law.").

[317] *See* MISS. CODE ANN. § 75-1-105(1) (1972 & Supp. 1997) ("Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.").

[318] *Id. See* Dunavant Enters., Inc. v. Ford, 294 So. 2d 788, 791 (Miss. 1974) (holding in absence of choice of law by parties that section 75-1-105(1) required application of Mississippi law in dispute arising from contract executed in Tennessee for cotton to be grown and delivered in Mississippi).

choice of law made by the parties, the statute provides that Mississippi law governs disclaimers of implied warranties of merchantability or fitness, limitations of remedies, and privity of contract, which are all matters relating to product liability claims.[319] The Code also contains specific provisions that determine choice of law and preempt contractual choice-of-law provisions in certain contexts.[320]

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[319] The language added to the statute is unique to Mississippi:

> Provided, however, the law of the State of Mississippi shall always govern the rights and duties of the parties in regard to disclaimers of implied warranties of merchantability or fitness, limitations of remedies for breaches of implied warranties of merchantability or fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness notwithstanding any agreement by the parties that the laws of some other state or nation shall govern the rights and duties of the parties.

MISS. CODE ANN. § 75-1-105(1) (1972 & Supp. 1997). This provision has been criticized. *See* Janet Dixon McMurtray, Comment, *A Constitutional Analysis of the Mississippi Commercial Code's Conflict of Laws Provision*, 53 MISS. L.J. 619, 629-34 (1983) (criticizing statute as applying Mississippi law regardless of state interest in case). And in a case where Mississippi had no significant contact or significant aggregation of contacts creating state interests, application of Mississippi law under this provision may be unconstitutional. *See* Price v. Litton Sys., Inc., 784 F.2d 600, 607 (5th Cir. 1986), *on remand sub nom.* Price v. International Tel. & Tel. Corp., 651 F. Supp. 706, 709 (S.D. Miss. 1986), *discussed in* Jackson v. National Semi-Conductor Data Checker/DTS, Inc., 660 F. Supp. 65, 70 (S.D. Miss. 1986) (stating that application of Mississippi warranty law was unconstitutional when there was no reasonable or appropriate relation of underlying claim to Mississippi); *id.* at 70-71 (suggesting that application of longer Mississippi limitations period to breach of warranty claim arising out of state would be unconstitutional when claim had no reasonable or appropriate relation to state). *But see* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (holding longer forum statute of limitations may constitutionally govern claims that have no relation to the state). *See generally infra* part VI(A).

[320] The applicable provisions are listed in section 75-1-105(2):

> Where one of the following provisions of this code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict-of-laws rules) so specified:
>
> Rights of creditors against sold goods (Section 75-2-402).
>
> Applicability of the chapter on Leases (Sections 75-2A-105 and 75-2A-106).
>
> Applicability of the chapter on Bank Deposits and Collections (Section 75-4-102).

b. General contracts

Historically, choice-of-law rules for contracts looked to the place of execution or performance.[321] The reason for doing so was not clear. Sometimes courts reasoned that the territorial law should govern rights created (or duties to be performed) in the territory; but sometimes they assumed territorial law should apply because the contracting parties wanted or expected it to apply.

Today in Mississippi substantive legal issues in contract are normally determined according to the law chosen by the parties.[322] Obviously, the choice itself must be a valid contract

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Letters of credit (Section 75-5-116).

Applicability of the chapter on Investment Securities (Section 75-8-110).

Perfection provisions of the chapter on Secured Transactions (Section 75-9-103).

Governing law in the chapter on Funds Transfers (Section 75-4A-507).

MISS. CODE ANN. § 75-1-105(2) (1972 & Supp. 1997). For example, issues concerning goods covered by a certificate of title are determined by the law (including the conflict-of-laws rules) of the state issuing the certificate of title until the certificate is surrendered or until a new certificate is issued by another state four months after the goods are removed from the state issuing the original certificate. *Id.* § 75-2A-105.

[321] *See supra* note 158; *see also* Carroll v. Renich, 15 Miss. (7 S. & M.) 798, 804-05 (1846) ("The law of the place of the contract must determine its validity, and govern the extent of its operation, unless it were made with a view to its execution elsewhere.").

[322] *See* Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 619 So. 2d 908, 911 (Miss. 1993) (citing Miller v. Fannin, 481 So. 2d 261, 262 (Miss. 1985)) ("[G]eneral rule is that courts will give effect to an express agreement that the laws of a specified jurisdiction shall govern."). Federal courts applying Mississippi choice-of-law theory have regularly enforced contractual choice-of-law provisions. *See* Hubbard Chevrolet Co. v. General Motors Corp., 873 F.2d 873, 876 (5th Cir. 1989) (enforcing choice of Michigan law in dispute over automobile dealership agreement); Herring Gas Co. v. Magee, 22 F.3d 603, 609 (5th Cir. 1994) (enforcing non-competition agreement in Louisiana under Mississippi law when contract selected Mississippi law to govern); Sorrels Steel Co. v. Great Southwest Corp., 906 F.2d 158, 167-68 (5th Cir. 1990); FMC Finance Corp. v. Murphree, 632 F.2d 413, 418 (5th Cir. 1980); Union Sav. Am. Life Ins. Co. v. North Central Life Ins. Co., 813 F. Supp 481, 485 (S.D. Miss. 1993), Bradley v. Old Republic Life Ins. Co., 712 F. Supp. 90, 93 (S.D. Miss. 1988). *See generally* JACKSON, *supra* note 4, § 4:24, at 4-35 to 4-36.

under Mississippi law.[323] The preference for validating parties' choice of law in contracts is consistent with the approach of the Restatement Second.[324] Under the Restatement Second, the parties' choice of law is automatically valid on substantive matters that they could have resolved by contract.[325]

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[323] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971):

> A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake. Whether such consent was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles. A factor which the forum may consider is whether the choice-of-law provision is contained in an "adhesion" contract . . . .

[324] The Restatement Second explains the preference:

> Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

Id. cmt. e. This rationale shows how much modern choice-of-law rules for contracts reflect modern theories of contracts. It raises the question, however, of whether those rules are appropriate when conflicts arise between states, one of which has fundamentally different legal ideas of contract law.

[325] *See id.* § 187(1) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").

This provision is, understandably, a source of consternation to Conflicts students. The comments actually add to the confusion. First they explain that this "is a rule providing for incorporation by reference and is not a rule of choice of law." *Id.* § 187 cmt. c. In other words, it is a gap-filler intended to effectuate the parties' intentions. For example, payment pursuant to a contract that contains a choice of Mexican law must be tendered in *pesos* (if that is the contract law of Mexico), because the parties presumably intended that result and presumably could have written that requirement into a contract. But if the rule states no more than a rule of interpretation designed to effectuate intent, then it is not clear why the rule should not fall to other contrary evidence of intent.

The comments further explain that whether parties could have resolved an

Even on matters they could not have resolved by contract, their choice-of-law resolution will apply if there is a reason for the choice and applying the chosen law does not violate a fundamental policy of the state with the most significant relationship to the transaction and the parties.[326]

Because of the strong judicial preference for validating choice-of-law agreements, it may be good advice routinely to include choice-of-law provisions in contracts.[327] At the time of contracting, parties are not usually in a position to make an informed determination about whether a particular jurisdiction's law will be favorable. Not only do the parties at the time of contracting assume there will be future compliance

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issue by explicit agreement is to be determined by the law of the state with the most significant relationship to the transaction and the parties. *Id.* The reason for this is not clear, and it seems in tension both with the interpretive purposes asserted for the rule and with the text of section 187, which invalidates a choice-of-law under the law of the state with the most significant relationship only when the parties could not have resolved the issue by prior explicit agreement. *Id.* § 187(2)(b).

[326] The Restatement Second specifies that a substantial relationship of the parties or the transaction to the place chosen is a reasonable basis for the choice:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id. § 187(2).

[327] *See* Chase Bryan, *Briefly Speaking: Business Contracts: Make "Choices" in Advance*, MISS. BUS. J. 20 (Dec. 5, 1994) ("[C]hoice-of-law provisions add certainty to transactions and should be included in contracts with out-of-state businesses. These provisions will determine which state's substantive law will govern a given contract. A choice-of-law provision will be enforced where there is some reasonable relationship between the state's law chosen and the transaction at issue in the litigation. This test usually is satisfied if some of the acts giving rise to the transaction occur in the state whose substantive law was chosen.").

with the contract, they do not foresee the specific legal problem that will present the need for a choice of law or they would address the issue directly in the contract. A choice-of-law agreement is therefore both wise and fair because the risk of an unfavorable choice falls equally on all parties while all parties benefit from the reduction of costs achieved by avoiding litigating the choice-of-law issue. Lawyers drafting choice-of-law clauses should be warned, however, that a contractual choice of foreign law may be a factor that helps establish personal jurisdiction in the foreign state's courts in a dispute arising from the contract.[328]

When there is no valid contractual choice of law, the contract will be governed by the law of the state with the most significant relationship to the transaction and the parties.[329] Contacts to be considered include the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the residences and places of business of the parties.[330]

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[328] *See* Burger King v. Rudzewics, 471 U.S. 462, 481-82 (1984) (Michigan franchisees' choice of Florida law was factor that court considered in finding that defendant had minimum contacts in Florida to support personal jurisdiction). This problem may be avoided by a forum selection clause, but not all courts will enforce such clauses. *See infra* notes 350-70 and accompanying text. Even if the forum selection clause is not itself enforced, the clause may rebut any inference about the parties' expectations of litigation and prevent the choice-of-law from establishing a contact supporting personal jurisdiction.

[329] "The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971). *See supra* note 245 (quoting text of section 6).

[330] *Id.* § 188(2):

> In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance

The Restatement Second provides more specific rules for certain situations and for certain kinds of contracts. When negotiation and performance are in the same state, that state's law normally applies.[331] Contracts for conveyance of land are normally governed by the law of the place where the land is located,[332] as are any contractual duties imposed by a deed.[333] Contracts for the sale of goods (not otherwise covered by the Uniform Commercial Code) are normally governed by the law of the place of delivery,[334] while loan agreements are

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with respect to the particular issue.

Mississippi cases cite and follow this section. *See* O'Rourke v. Colonial Ins. Co., 624 So. 2d 84, 86 (Miss. 1993); Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1032 (Miss. 1985), *answer conformed to*, 768 F.2d 718 (5th Cir. 1985).

[331] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(3) (1971) ("If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-99 and 203.").

[332] *Id.* § 189:

> The validity of a contract for the transfer of an interest in land and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

[333] *Id.* § 190:

> The contractual duties imposed upon the parties to a deed of transfer of an interest in land are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

[334] *Id.* § 191:

> The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

normally governed by the law of the place of repayment.[335] Contracts for services are normally governed by the law of the place where the services are to be performed.[336] Insurance contracts are governed by the law of the place where the insured risk is located.[337] Contracts for the transportation of

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[335] *Id.* § 195:

> The validity of a contract for the repayment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

[336] *Id.* § 196:

> The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

[337] *Id.* § 192:

> The validity of a life insurance contract issued to the insured upon his application and the rights created thereby are determined, in the absence of an effective choice of law by the insured in his application, by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Id. § 193:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined, by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Note that effect is *not* necessarily given to the parties' choice of law for fire, sure-people or things are normally governed by the law of the place of departure.[338]

Mississippi cases have held that a contract is governed by the law of the parties' residence and place of contract (when they are the same place),[339] that an insurance agreement is governed by the law of the principal location of the risk,[340]

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ty, or casualty insurance. *See id.* § 193 cmt. e.

Id. § 194:

> The validity of a contract of suretyship and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the law governing the principal obligation which the contract of suretyship was intended to secure, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

[338] *Id.* § 197:

> The validity of a contract for the transportation of passengers or goods and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state from which the passenger departs or the goods are dispatched, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

[339] O'Rourke v. Colonial Ins. Co., 624 So. 2d 84, 86-87 (Miss. 1993).

[340] Ford v. State Farm Ins. Co., 625 So. 2d 792, 794-95 (Miss. 1993); Boardman v. United Servs. Auto Ass'n, 470 So. 2d 1024, 1032 (Miss. 1985). *Accord* Moore v. United Servs. Auto. Ass'n, 808 F.2d 1147, 1151 (5th Cir. 1987) (holding under Mississippi choice-of-law rules that Florida law prevented Florida residents from stacking uninsured motorist coverage in policy issued to them in Florida for damages sustained in accident in Mississippi); Nichols v. Anderson, 788 F.2d 1140, 1142 (5th Cir. 1986); Maryland Cas. Co. v. Integrity Ins. Co., 693 F.2d 506, 508 (5th Cir. 1982); Blue Bird Body Co. v. Ryder Truck Rental, Inc., 583 F.2d 717, 723 (5th Cir. 1978); Dees v. Hallum, 721 F. Supp. 789, 790 (N.D. Miss. 1989) (holding under Mississippi choice-of-law theory and referring to Restatement Second section 93 that California law governed insurance agreement covering car rented in California); Perry v. State Farm Mut. Auto. Ins. Co., 606 F. Supp. 270, 274 (S.D. Miss. 1985) (applying California law to prevent stacking of uninsured motorist coverage). *Cf.* Deramus v. Jackson Nat'l Life Ins. Co., 92 F.3d 274, 275 (5th Cir. 1996) (holding that Mississippi law applicable under Mississippi "center-of-gravity" prevented insured's recovery from insurer based on insurer's failure to disclose positive HIV test results). In finding that Mississippi law governed, however, the Fifth Circuit only made reference to the "center-of-

that a land sale contract is governed by the law of the place of the land when the contracts are also executed and signed in that state,[341] and that a promissory note is governed by the law of the place where it is executed and made payable.[342] In applying the law of the place of the contract in some cases, the Mississippi Supreme Court has assumed that the parties intended to be governed by that law in the absence of a choice-of-law agreement.[343] Taking this reasoning to its extreme, all

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gravity," not the place where the risk was located. *Deramus*, 92 F.3d at 275. But the opinion refused to identify the plaintiff's and decedent's place of residence or citizenship, apparently in order to preserve anonymity. *Id.*

[341] Spragins v. Louise Plantation, Inc., 391 So. 2d 97, 100 (Miss. 1980).

[342] Estate of Lawrence Thomas Jefferson, No. 95-CA-00226 COA, slip op. at 7 (Ct. App. Miss. Jan. 30, 1996) (not designated for publication and may not be cited pursuant to MISS. R. APP. P. 35-B) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 214(1) that "obligations of the maker of a note . . . are determined . . . by the local law of the state designated in the instrument as the place of payment.").

The note in the case was executed by a Mississippi resident living in Alaska, made payable in Alaska to Alaska residents, and secured by real property in Mississippi. *Id.* at 2. The payor's estate challenged the note's 30 per cent interest as usury under Mississippi law. *Id.* at 4. The chancellor, applying the balancing approach of the Restatement Second, concluded that Mississippi law applied. *Id.* at 5. The Court of Appeals reversed, suggesting that the interest may not have been invalid under Mississippi law and concluding in any event that Alaska law governed. *Id.* at 8.

The appellate court did not cite the Restatement provision that specifically covers usury. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971) ("The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.").

A similar result was reached in *FMC Fin. Corp. v. Reed*, 592 F.2d 238, 241-42 (5th Cir. 1979). Applying Mississippi choice-of-law rules, the court concluded that the contract was governed by California usury law. *Reed*, 592 F.2d at 242. California contacts predominated—California was the place the finance agreement was negotiated, the place formal documentation was mailed, and the place payment was made. *Id.* at 241-42. The only Mississippi contacts were the residence of the borrower and the location of some property subject to security interests in Mississippi. *Id.* at 242. But the federal court rested its holding neither on Restatement Second section 214(1) nor on the section dealing specifically with usury. Instead it applied a balancing approach and found that enforcing the contract under California law promoted the expectations of the contracting parties. *Id.*

[343] *Spragins*, 391 So. 2d at 100, *repeated in* Tideway Oil Programs, Inc. v.

choice-of-law issues in a contract dispute might be reduced to a matter of express or implied intent, and parties might attempt to introduce evidence as to their intent about governing law, just as they do for other disputes about intent. This would be inappropriate. In the absence of an actual agreement, the parties had neither an intent with respect to the legal problem on which the laws of two jurisdictions conflict, nor an intent with respect to which jurisdiction's law should govern. Accordingly, choice of law (in the absence of an agreement) should be made by the court without reference to the parties' intent.

For matters of construction of contract language, the Restatement Second provides a complex multi-level set of rules[344] that have not yet been found useful or applied in any Mississippi decision.[345] The Mississippi Supreme Court has stated broadly that "the law governing construction or interpretation of a contract . . . is substantive for conflict of law purposes."[346] As was suggested above with respect to the interpreta-

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Serio, 431 So. 2d 454, 458 (Miss. 1983).

[344] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204 (1971):

> When the meaning which the parties intended to convey by words used in a contract cannot satisfactorily be ascertained, the words will be construed
> (a) in accordance with the local law of the state chosen by the parties, or
> (b) in the absence of such a choice, in accordance with the local law of the state selected by application of the rule of § 188.

The rule's complexity results from the words (themselves in need of construction) that direct a reference to foreign law only when the parties' meaning otherwise "cannot be satisfactorily ascertained." *Id.* cmt. a. In *Cottingham v. General Motors Corp.*, 119 F.3d 373, 376 (5th Cir. 1997), Chief Judge Politz stated the general rule (apparently as law of the forum) that the determination of a contract's ambiguity is reviewed *de novo*. But, finding no ambiguity, he did not need to choose between Mississippi law or the Michigan law chosen by contract. *Cottingham*, 119 F.3d at 377.

[345] *Boardman*, 470 So. 2d at 1024, *answer conformed to*, 768 F.2d 718 (5th Cir. 1985), dictum notwithstanding, did not, for the reasons given, *supra* note 189, concern choice-of-law with respect to rules of construction as there was neither an ambiguity in the contract requiring construction, nor a conflict among the states' laws of construction requiring a choice of law.

[346] Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 619 So. 2d 908, 912 (Miss. 1993). The court looked to New York cases in interpreting an arbitration clause in the contract but found that it was waived. *Cox*, 619 So. 2d at 914.

tion of conveyances and wills,[347] the practice of deferring to foreign rules of interpretation in matters of intent makes little sense. The rules relied on often simply restate common sense principles well known to Mississippi courts.[348] The truth is that courts already apply their own law to interpretation,[349] and it would be better and easier openly to apply Mississippi principles of construction and interpretation to matters of intent, as these are the ones best designed to uncover actual intent. Recourse to foreign rules of interpretation makes sense only when such rules were relied on in drafting.

c. *Forum-selection clauses*

Federal courts applying federal law in cases within their federal subject-matter jurisdiction will enforce mandatory forum-selection clauses[350] unless they are unreasonable.[351] In cases within the federal courts' diversity-of-citizenship jurisdiction, circuits are split as to whether state law or federal law determines the validity of forum-selection clauses.[352] The Fifth Circuit has held that federal principles govern and that forum-selection clauses are enforceable.[353] When considering motions to transfer within the federal system, courts give great weight to such clauses, notwithstanding local policies against forum-selection.[354] Nevertheless, courts will construe an ambiguous forum-selection agreement as permissive rather than mandatory.[355]

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[347] *See supra* notes 225-26 and accompanying text.

[348] For example, in *Cox*, 619 So. 2d at 912-13, the court looked to New York law for the principles that 1) words and phrases must be given their plain and ordinary meaning; 2) ambiguous language in a contract must be construed against the party who drafted the language; 3) when there is uncertainty, judicial construction should produce reasonable results; and 4) time limits should be reasonable. These general principles accord with Mississippi law and are reasonable because they are designed to effectuate the parties' intent. But if foreign rules of construction were unreasonable or did not effectuate the parties' intent, applying them would be unfair.

[349] *Cf.* McCain v. Cox, 531 F. Supp. 771, 779 (N.D. Miss. 1982) (Keady, C.J.) (applying Mississippi law to interpretation because Mississippi was place of litigation), *aff'd without opinion*, 692 F.2d 755 (5th Cir. 1982).

[350] Permissive forum-selection clauses, or agreements to submit to a court's jurisdiction, have long been enforced and are generally constitutional (even in the absence of other contacts that would make the court a fair forum). *E.g.*, National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964). *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 30[c][2], at 76-79.

The more difficult issue is whether mandatory forum-selection clauses will be enforced—that is, whether a court that otherwise has jurisdiction will honor the parties' choice of forum by dismissing the action or perhaps even entering an order requiring litigation in a foreign court.

[351] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589-95 (1991) (enforcing boilerplate forum-selection clause contained in cruise tickets in personal injury action brought within admiralty jurisdiction); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) ("[S]uch clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable'

Mississippi state courts have not yet decided whether to enforce mandatory forum-selection clauses.[356] Other states are

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under the circumstances . . . is the correct doctrine to be followed by federal district courts sitting in admiralty."). *See generally* SCOLES & HAY, *supra* note 15, § 11.4, at 362-64; WEINTRAUB, *supra* note 132, § 4.35, at 223-26. For cases refusing to enforce particular forum-selection clauses as unreasonable, see *id.* at 224-25 n.32.

[352] *Compare* Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990) (enforcing forum-selection clause unless it would be unreasonable and unjust or if clause was obtained through fraud or overreaching); Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 512 (9th Cir. 1988) (implementing federal policy in favor of forum-selection clauses) *and* Nutter v. Rents, Inc., 1991 U.S. App. LEXIS 22952 at ** 14-15 (4th Cir. Oct. 1, 1991) *with* Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 916-19 (11th Cir. 1989) (holding that *Erie* requires application of state law regarding enforceability of forum-selection clause in absence of federal statute or rule). *See generally* SCOLES & HAY, *supra* note 15, § 11.5, at 363-64.

[353] *See* International Software Sys., Inc. v. Amplicon, 77 F.3d 112, 113, 115 (5th Cir. 1996) (holding that federal not state law determines enforceability of forum-selection clause and affirming dismissal of action where parties had agreed to litigate exclusively in California state courts).

[354] Stewart Org., Inc., v. Ricoh Corp., 487 U.S. 22, 31 (1988) (granting motion to transfer under § 1404(a) to federal district that parties selected in contract notwithstanding invalidity of forum-selection agreement under law of state where district court sat). The Supreme Court emphasized, however, that it was not holding the forum-selection enforceable under federal judge-made policies but under the statute. *Ricoh Corp.*, 487 U.S. at 32. *Cf.* 28 U.S.C. § 1404(a) (1988) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

[355] Calda & Sons, Inc. v. Willingham, 17 F.3d 123, 127 (5th Cir. 1994); Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 957 (5th Cir. 1974).

[356] The Restatement Second directs the enforcement of forum-selection clauses unless unfair or unreasonable. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS

divided: some enforce the clauses when reasonable, but others refuse to enforce them because they consider the effect, ousting the court of otherwise proper jurisdiction, to be offensive to public policy.[357]

There are some good arguments for enforcing forum-selection agreements. Doing so gives effect to the contractual expectations of the parties and helps reduce the court's caseload. But there are also compelling reasons against enforcing such agreements. Because the agreements seek to oust courts of otherwise proper jurisdiction and to deprive the contracting parties of a remedy, forum-selection clauses were traditionally void in every jurisdiction as violating public policy.[358] It is uncertain whether Mississippi will join those jurisdictions that now enforce the clauses, for other Mississippi state laws reveal particularly powerful policies against permitting parties to oust themselves of judicial remedy by agreement. For example, unlike most other states, Mississippi does not permit parties to shorten the statute of limitations by contract,[359] and parties may not by

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§ 80 (1971) ("The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.").

Mississippi courts have not yet relied on this section, and it is uncertain whether they would follow it. "The [Mississippi] Supreme Court has not indicated that the entire Second Restatement has been adopted as controlling law in Mississippi's choice of law cases." Jackson, *supra* note 3, § 4.1, at 4-3 n.5.

Although the Mississippi Supreme Court has adopted the Restatement Second's provision on forum non conveniens, Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 561 (Miss. 1988), the actual influence of the Restatement Second on that decision is uncertain, because forum non conveniens had been approved in numerous prior Mississippi cases. *See* Missouri Pac. R.R. Co. v. Tircuit, 554 So. 2d 878, 881 (Miss. 1989) (citing line of Mississippi cases going back to 1943 that approved forum non conveniens). The Supreme Court has not followed other parts of the Restatement Second when its treatment does not satisfactorily promote Mississippi state policies, deviating, notably, in applying Mississippi law to matters of remedy and when public policy requires, *see supra* Part IV(A) and *infra* Part IV(C).

[357] *See generally* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4TH 404, 423-38 (1984 & Cumm. Supp.).

[358] *See generally* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-10 n.10 (1972) (discussing historical reluctance of courts to enforce forum-selection clauses).

[359] MISS. CODE ANN. § 15-1-5 (1995) ("The limitations prescribed in this chap-

an otherwise valid choice-of-law provision reduce the remedies available for breach of implied warranties of merchantability or fitness.[360] While parties' choice-of-law agreements are respected by Mississippi courts,[361] such agreements are effective only for "substantive" issues, and Mississippi law always governs the remedy.[362] Nor will Mississippi courts grant a dismissal on grounds of forum non conveniens when there is no other forum available.[363]

Furthermore, federal experiments with enforcing forum-selection clauses have not been entirely satisfactory. Though such clauses are supposedly enforced only when reasonable, even the most blatant boilerplate clauses have become routinely enforced[364] unless the contract was the result of fraud or overreaching or enforcement would deprive a party of a day in court.[365] Commentators have criticized the indiscriminate enforcement of mandatory forum-selection clauses.[366]

Mississippi's enforcement of choice-of-law agreements does not provide authority for enforcing forum-selection agreements.

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ter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void, the object of this section being to make the period of limitations for the various causes of action the same for all litigants.").

[360] *Id.* § 75-1-105(1) (1972 & Supp. 1997); *see supra* note 319.

[361] *See supra* notes 317, 326 and accompanying text.

[362] *See supra* note 119.

[363] Missouri Pac. R.R. Co. v. Tircuit, 554 So. 2d 878, 883 (Miss. 1989); Shewbrooks v. A.C. & S., Inc., 529 So. 2d 557, 561 (Miss. 1988).

[364] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 597-98 (1991) (Stevens, J. dissenting) (appending copy of ticket showing forum-selection clause was deeply imbedded in fine print boilerplate language that consumer of services almost certainly would not have read).

[365] First Mississippi Corp. v. Thunderbird Energy, Inc., 876 F. Supp. 840, 844-45 (S.D. Miss. 1995) (Barbour, J.).

[366] *E.g.*, Patrick J. Borchers, *Forum Selection Clauses in the Federal Courts After* Carnival Cruise*: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992); Jeffrey A. Liesemer, Note, *Carnival's Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine After* Carnival Cruise Lines, Inc. v. Shute, 53 U. PITT. L. REV. 1025 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992); William M. Richman, Carnival Cruise Lines*: Forum Selection Clauses in Adhesion Contracts*, 40 AM. J. COMP. L. 977 (1992).

Forum-selection clauses are distinguishable from choice-of-law clauses. The risks of an adverse choice-of-law selection fall equally on all parties, and all parties share the benefit of reduced costs that flow from the enforcement of the clauses.[367] In striking contrast, forum-selection clauses overwhelmingly favor corporate defendants as a group. Only corporate parties who engage legal advice in drafting original contract documentation have the foresight to insert boilerplate language identifying a forum as the exclusive site of litigation. While such parties may have legitimate interests in centralizing litigation,[368] one suspects the motives for forum-selection clauses are often less neutral. These defendants usually have more or less fixed litigation costs regardless of the forum, but their selection of a forum inconvenient for large numbers of potential plaintiffs drastically raises the plaintiffs' costs, thus discouraging both merited and groundless claims and artificially reducing the settlement value of valid claims.[369]

Forum-selection agreements, when reasonable, present fewer problems in commercial litigation or in cases involving corporate parties who were represented by lawyers in negotiations and who, being required to retain counsel in litigation, have more portable cases. But forum-selection agreements involving individuals raise significant policy concerns about access to justice and fairness[370] that may lead Mississippi courts to refuse to enforce forum selection clauses in such cases.

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[367] *See supra* text at note 328.

[368] This argument was given much weight by the Supreme Court. *See Carnival Cruise Lines*, 499 U.S. at 593-94 ("[A] cruise line has a special interest in limiting the fora in which it potentially could be subject to suit . . . . [and] passengers . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

[369] Justice Stevens bluntly compared forum-selection clauses to clauses limiting liability and explained their common purpose was "to put a thumb on the [defendant] carrier's side of the scale of justice." *Carnival Cruise Lines*, 499 U.S. at 600 (Stevens, J., dissenting).

[370] *See* MISS. R. CIV. P. 1 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.").

C. The Public Policy Exception

Even if a legal issue is determined to be substantive for purposes of conflict of laws, and even if Mississippi's choice-of-law rules determine that foreign law should apply to the issue, the Mississippi courts will nevertheless refuse to apply the foreign law if it is "offensive to the deeply ingrained or strongly felt public policy of the state."[371] Justice Robertson expressed the rule:

> [W]e recognize that there will be cases where, applying the center of gravity doctrine, we might conclude in the first instances that the law of another state should be applied. Where that law is contrary to the deeply ingrained and strongly felt public policy of this state, however, we have recognized that we may nevertheless apply and enforce this state's positive substantive law.[372]

Obviously, not every foreign law inconsistent with a Mississippi statute or rule of decision will be considered offensive to Mississippi public policy or else every case involving conflicts of law would result in the application of Mississippi law.

Public policy provides an exception to the normal operation of choice-of-law rules, and the sort of foreign law that qualifies for the exception has traditionally been defined narrowly.[373]

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[371] O'Rourke v. Colonial Ins. Co., 624 So. 2d 84, 88 (Miss. 1993). *See also* Laskosky v. Laskosky, 504 So. 2d 726, 731 (Miss. 1987) (observing in dictum that court would not recognize Canadian support or custody decree that was not in child's best interests).

[372] Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1031 (Miss. 1985) (citing McNeal v. Estate of McNeal, 254 So. 2d 521, 524 (Miss. 1971)).

[373] The Mississippi Supreme Court has identified sources of public policy: "[T]his court is committed to the doctrine that the public policy of the state must be found in its constitution and statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials." King v. City of Jackson, 667 So. 2d 1315, 1316 (Miss. 1995) (quoting Anderson v. Jackson Mun. Airport Auth., 419 So. 2d 1010, 1023 (Miss. 1982); Cappaert v. Junker, 413 So. 2d 378, 380 (Miss. 1982)).

Justice Cardozo's formulation is cited frequently by treatises:

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fun-

Sometimes it may be hard to distinguish a matter that is governed by Mississippi law because it is deemed procedural from matters that are governed by Mississippi law because the foreign law is deemed offensive to public policy. The two areas may overlap. For example, the Mississippi Supreme Court applied Mississippi spousal and parental immunity and refused to recognize tort claims brought against the estate of a deceased husband and father.[374] Even though the parties were from Louisiana, which apparently permitted such claims, the court held that Mississippi law governed for two reasons—first, because the Louisiana law was contrary to Mississippi public policy, and second, because forum law governed all matters of procedure.[375]

The first Restatement allowed a forum to disregard its normal territorial rules when its enforcement of a foreign cause of action would offend its public policy.[376] The Restatement Second includes no separate public policy exception but rather directs courts in making choice-of-law determinations to consider factors that include "the relevant policies of the forum."[377] Because of inconsistencies in applying the public poli-

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> damental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.). *See generally* RICHMAN & REYNOLDS, *supra* note 15, § 59, at 159-61.

[374] McNeal v. Estate of McNeal, 254 So. 2d 521, 524-25 (Miss. 1971).

[375] *McNeal*, 254 So. 2d at 524-25. The court, in asserting the strength of the policy behind the common-law familial immunities, did not suggest those policies were reduced because the parties were residents of another state that did not recognize the immunities. *Id.* at 522-25.

[376] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (1934) ("No action can [sic] be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."). The Restatement cautioned that "mere difference between the laws of the two states will not render the enforcement of a cause of action created in one state contrary to the public policy of the other." *Id.* § 612 cmt. b. It emphasized that "application of this Section is extremely limited." *Id.* § 612 cmt. c. Older cases refused to extend public policy to strike *defenses* raised under foreign law even when the defenses were deeply repugnant to forum policy. *E.g.*, Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798, 800 (N.Y. 1938) (refusing to strike defense in wrongful discharge action that Nazi laws required firing Jewish employees).

[377] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (1971). The com-

cy exception, some scholars tout the Restatement Second as an improvement.[378]

Mississippi courts have continued to refer to public policy as an "exception" to their choice-of-law rules at the same time that they have fashioned a flexible approach to the exception that recognizes that Mississippi policy interests are stronger in some cases than others.[379] Nevertheless, even when Mississippi law reflects important public policy, the policy is not necessarily so strong that it prevents application of foreign law in a case where the parties are all nonresidents. For example, in holding that Tennessee law disallowing stacking should apply in an action for uninsured motorist coverage by Tennessee

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ments explain more fully:

> Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made. On the other hand, the court is under no compulsion to apply the statute or rule to such out-of-state facts since the originating legislature or court had no ascertainable intentions on the subject. The court must decide for itself whether the purposes sought to be achieved by a local statute or rule should be furthered at the expense of the other choice-of-law factors mentioned in this Subsection.

Id. § 6 cmt. e.

[378] *E.g.*, RICHMAN & REYNOLDS, *supra* note 15, § 59, at 160 ("Fortunately, both the Restatement (Second) and other modern forms of choice-of-law analysis (more or less) successfully direct attention to the real questions that a court should ask in this area: How do we know what our policy is here, and why does a foreign law offend that policy?").

[379] See Justice Robertson's discussion of this:

> Every choice of law problem, by definition, arises out of a situation where the substantive law of the competing state differs from that of this state. Because of this and because every law of this state presumably reflects the public policy of this state, we are caught in a Catch-22. The way out is recognition that some of our laws reflect public policies which are more fundamental and more inviolable than others. Some of our laws reflect public policies more strongly felt and more deeply ingrained than others.

Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1038-39 (Miss. 1985).

residents against their insurer arising from an accident that occurred in Mississippi,[380] Justice Roberts paid special attention to the expectations of parties under the contract and to the fact that the case concerned a contract executed in Tennessee between a Tennessee insured and a non-Mississippi insurer.[381]

So, too, the supreme court allowed a defense under an "owned vehicle" exclusion clause[382] that was valid under the law of Nebraska even though it violated strong Mississippi policies against such exclusions, emphasizing that the contract was made in Nebraska between a Nebraska insured and a non-Mississippi insurer.[383]

Although the residence of parties was obviously important to the court's reasoning in these two cases, other factors also may have justified applying foreign law, notwithstanding strong Mississippi policies to the contrary. The cases involved defenses raised under foreign law rather than foreign causes of action, and they involved foreign contracts.[384]

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[380] O'Rourke v. Colonial Ins. Co., 624 So. 2d 84, 88-89 (Miss. 1993).

[381] *O'Rourke*, 624 So. 2d at 84, 89. Justice McCrae, joined by Justice Sullivan, dissented, arguing that Mississippi's strong policy in favor of stacking supported application of Mississippi law and pointing out that the result might differ if the passenger had been a resident of another state. *Id.* at 90 (McCrae, J., dissenting).

[382] The clause excluded recovery under the policy's uninsured motorist coverage to an insured who was driving an *uninsured* car owned by the insured or his or her relative. *Boardman*, 470 So. 2d at 1029 (quoting contract).

[383] *Id.* at 1039.

[384] Justice Robertson, for example, viewed the judicial task as requiring an accommodation of the public policy behind the prohibition of the exclusion and the policy of effectuating the reasonable expectations of contracting parties. *See id.* at 1038.

> This question is not, what would be the public policy of this state regarding an exclusion such as that claimed here were the insureds Mississippians. Rather, the question is whether we have a public policy which is so strong that it would override the reasonable expectation (if they thought about it) of both . . . [the insurer] and . . . [the car owner] that at the very least the coverage questions arising with respect to their contract would be governed by the law of Nebraska.

Id. Justice Robertson did not explain why a Mississippi policy designed to frustrate intent should be given less weight in cases with out-of-state parties, nor why the state law the parties wanted to govern should matter when the parties clearly expressed their intent to exclude the coverage at issue.

If Mississippi's purpose was to prevent unconscionable contracts, then its poli-

Although the courts discount the force of public policy when Mississippi's contacts are weak, strong Mississippi policy concerns can also overcome contacts that otherwise tip the balance in favor of applying foreign law. For example, in *McDaniel v. Ritter*,[385] Justice Robertson held that Mississippi comparative negligence must apply, notwithstanding the prevalence of Tennessee contacts as to other issues.[386] Justice Robertson's opinion illustrates the current ambiguity of Mississippi law. On one hand, his opinion may be interpreted to mean, with special reference to the policies behind comparative negligence, that Mississippi has the most significant relationship with respect to that issue. On the other hand, it could be interpreted to mean, despite the fact that Tennessee had the most significant relationship, that Mississippi's comparative negligence applies because Tennessee's law of contributory negligence offended Mississippi public policy. In a subsequent opinion, Justice Robertson suggested that the opinion was grounded on public policy grounds.[387]

Whether public policy is a true exception to choice-of-law rules or a factor to take into account in the balancing required by the Restatement Second is not just an academic question. The theoretical status of the public policy exception may affect the outcome in cases. For example, if public policy is a true exception, then Mississippi's comparative negligence law might properly apply in cases between nonresidents whose home law is contributory negligence.[388] But, if public policy is only a

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cy would, perhaps, not require its application to out-of-state contracts. On the other hand, if the purpose was simply to provide coverage (as seems more likely), then it is hard to understand why that policy did not require its application to injuries suffered as a result of an accident in Mississippi suffered by an insured who was living and working in Mississippi.

[385] 556 So. 2d 303 (Miss. 1989).

[386] *McDaniel*, 556 So. 2d at 316-17. *See supra* note 286.

[387] *See Boardman*, 470 So. 2d at 1039 ("Mississippi's comparative negligence and intra-family tort immunity rules reflect longstanding public policies that may be said to be fundamental. Enforcement of the contrary rules . . . would be offensive to our sense of justice.").

[388] This is the reasonable conclusion of Judge Davidson. *See* Rieger v. Group Health Ass'n, 851 F. Supp. 788, 791 (N.D. Miss. 1994) (applying Mississippi comparative negligence in medical malpractice claim for malpractice committed in

consideration, then courts might apply contributory negligence in such cases because the Mississippi state policy behind comparative negligence may be reduced or counterbalanced by other considerations.

D. Renvoi

When Mississippi's choice-of-law rules determine that some other state's law governs the case, a question may arise as to whether the court should look only at that other state's local law or whether it should look at its whole law, including its conflict-of-laws law. The overwhelming weight of authority suggests that normally the local law of the other state should be applied.[389] This is the official position of the Restatement Second[390] and the practice of federal courts applying Mississippi's choice-of-law rules.[391] Nevertheless, the fact that the foreign state would not apply its own law has been identified by the Mississippi Supreme Court as indicating the foreign state's lack of a strong interest in having its law apply.[392]

Maryland, which retained contributory negligence). *Rieger* presented more complicated facts, creating a basis for arguing Mississippi had contacts creating a state interest in application of it law. For example, the plaintiff had been a Maryland resident at the time of her original treatment and later moved to Mississippi, commencing the action while a Mississippi resident. *Rieger*, 851 F. Supp. at 789-90. She later moved to Pennsylvania. *Id.* at 790 n.1. The opinion is not clear, but it is possible that some of the plaintiff's own behavior establishing a ground for reducing or barring recovery (her failure to follow health care instructions) may have occurred in Mississippi. But the court paid no attention to the contacts with Mississippi, holding broadly that comparative negligence must apply because contributory negligence violated Mississippi public policy. *Id.* at 791.

[389] *See generally* SCOLES & HAY, *supra* note 15, § 3.13, at 67-72; RICHMAN & REYNOLDS, *supra* note 15, § 58 at, 155-59; WEINTRAUB, *supra* note 133, § 3.3, at 66-71.

[390] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(1) (1971): "When directed by its own choice-of-law rule to apply 'the law' of another state, the forum applies the local law of the other state . . . . " There are two exceptions: 1) when the objective of the choice-of-law rule is uniformity and 2) when all courts of interested states would apply some local law and the forum has no interest in applying another. *Id.* § 8(2)&(3). The exceptions are broader than often supposed and may, for example, require renvoi in all cases involving false conflicts.

[391] *See* Nailen v. Ford Motor Co., 873 F.2d 94, 96 (5th Cir. 1989) (refusing to accept renvoi argument).

[392] *See* McDaniel v. Ritter, 556 So. 2d 303, 315 (Miss. 1989) ("That a Tennes-

V. CHOICE-OF-LAW RULES IN FEDERAL COURT

A. *Diversity Jurisdiction*

Federal courts sitting in Mississippi must apply Mississippi choice-of-law rules in diversity cases, regardless of whether Mississippi characterizes the conflicts issue as substantive or procedural.[393] In theory, this means that federal courts should

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see court would likely enforce Missouri law does not control us; it is but a factor"); *see supra* note 308.

[393] *See* U.S. CONST. amend. X (powers not delegated to federal government are reserved to the states or to the people); 28 U.S.C. § 1652 (1994); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 491 (1941); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nailen v. Ford Motor Co., 873 F.2d 94, 96 (5th Cir. 1989); Price v. Litton Sys., Inc., 784 F. 2d 600, 602 (5th Cir. 1986); Wright v. Standard Oil Co., 470 F.2d 1280, 1284 (5th Cir. 1972); Alabama Great S. R.R. v. Allied Chem. Corp., 467 F.2d 679, 682 (5th Cir. 1972); Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940). *See generally* Jan P. Patterson, Comment, *State or Federal Law in Federal Courts: The Rise and Fall of Erie*, 42 MISS. L.J. 89, 93-94 (1971). Accordingly, federal courts in Mississippi will act exactly like Mississippi state courts in deciding choice-of-law issues, unless the action is pending in federal court in Mississippi because it was commenced in another state and transferred here under 28 U.S.C. § 1404(a) (1994), in which case the federal court must apply the state law, including the conflict-of-laws law, of the state in which the transferring court sat. *See* Ferens v. John Deere Co., 494 U.S. 516, 532 (1989) (holding that transferee court must apply state conflicts law of state in which transferring court sat); Van Dusen v. Barrack, 376 U.S. 612, 640 (1964) (holding change of venue under section 1404(a) should not be accompanied by change in state law). Actions transferred to federal courts in Mississippi from districts in other states under 28 U.S.C. § 1406 (1994) would be governed by Mississippi choice-of-law rules. In Piper Aircraft Co. v. Reyno, 454 U.S. 235, 243 n.8 (1981), the Supreme Court noted with apparent approval the trial court's conclusion that the state law of the transferring district applied to a case transferred pursuant to section 1404(a) transfer while the state law of the transferee district applied to the related case transferred pursuant to section 1406. The Court held that the trial court did not abuse its discretion in granting a dismissal on grounds of forum non conveniens supported in part by the trial court's finding that the complexity in applying two different foreign laws in the case established a valid public interest in favor of granting forum non conveniens. *Reyno*, 454 U.S. at 261.

It has been argued that when a federal court decides state claims under state law but exercises broader jurisdiction over claims or parties than the state court could exercise—for example, when exercising federal interpleader jurisdiction—the federal court should:

> be free to depart from those state choice-of-law rules if it sees fit to do so. The federal court should act as a responsible neutral forum. A neutral forum should not apply its own choice-of-law rule if that rule differs

decide a choice-of-law case exactly as a Mississippi state court would. In practice, however, federal courts have been understandably reluctant to predict changes in Mississippi law or to assert Mississippi state policies in the absence of explicit state authority, and they have, consequently, applied Mississippi choice-of-law rules more conservatively than the state courts.[394] Federal courts have relied extensively on tie-break-

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> from the rule in all states that have contacts with the parties and with the event and all contact states would reach an identical result.

WEINTRAUB, *supra* note 133, § 10.7A, at 607, *id.* §§ 10.7B-10.7C. This proposal is inconsistent with cases, *e.g.*, Griffin v. McCoach, 313 U.S. 498, 503 (1941) (holding that interpleader action was governed by state law of state in which federal court was sitting). There is no authority yet for this proposed practice. But some scholars think the inconsistent case law should be overruled. *See* RICHMOND & REYNOLDS, *supra* note 15, § 104, at 305 (asserting federal courts should develop federal choice-of-law principles); SCOLES & HAY, *supra* note 15, § 3.43 at 123-24 (asserting federal court should fashion own choice-of-law rules). The American Law Institute, in proposing nationwide federal jurisdiction, proposed that the federal courts be empowered to decide what state's law to apply; *see* WEINTRAUB, *supra* note 133, § 10.7C, at 608.

The scholars may be right in theory. But there are two arguments in favor of rigid adherence to the rule that federal courts should apply the state choice-of-law rules of the state in which they sit even when exercising broader jurisdiction than the state court could. First, reference to state law is simpler than developing new special federal choice-of-laws rules to apply in such cases. There is no reason to believe that federal courts would arrive at any better method for choosing among conflicting state laws than the states themselves. On the contrary, this is an area where state judges have considerable experience, and federal judges none. Second, it is doubtful that Congress meant to displace the normal operation of the Erie doctrine when it extended federal jurisdiction to confront special problems unrelated to choice of law; accordingly, the choice-of-law rules of the state in which the federal court sits should still apply under the Rules of Decision Act. *See* 28 U.S.C. § 1652 (1994) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

[394] Two of the most carefully reasoned federal decisions in the area reveal this tendency. Judge Davidson, rejecting an argument that Mississippi public policy should deny enforcement of a limit on noneconomic damages under foreign law, relied specifically on the lack of direct authority on point, placing the burden on plaintiff to identify "tangible support" in the form of state court cases showing that Mississippi would reject foreign caps on noneconomic damages and rejecting as "speculative" the sort of policy arguments that might have been received favorably by a state court. Rieger v. Group Health Ass'n, 851 F. Supp. 788, 793 (1994). The plaintiff was unable to surmount the handicap imposed by a case of

ing presumptions,[395] a practice that has the effect in most cases of restoring the first Restatement rules. Federal courts have also relied extensively on prior federal decisions interpreting Mississippi choice-of-law rules, though the Mississippi Supreme Court has given such decisions no comparable weight.

Therefore, notwithstanding the policy behind the *Erie* doctrine of preventing forum shopping between state and federal courts,[396] parties with a choice-of-law case that is resolved favorably either by a prior decision from the Fifth Circuit applying Mississippi law or by one of the Restatement Second's tie-breaking rules should seek a federal forum. Conversely, parties that will have favorable law chosen only by judicial evaluation of policies or by a judicial determination that the law is qualitatively preferable should avoid a federal forum. It is to be hoped, however, that this advice will become unnecessary as federal courts recognize that their practice has frustrated the uniform administration of choice-of-law law in Mississippi.[397]

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first impression:

> Mississippi has never had the opportunity to explore the constitutional or public policy ramifications of another jurisdiction's cap on damages. While that day may well present itself in the future, it has not occurred at this time.

Rieger, 851 F. Supp. at 792.

Likewise Judge Barksdale refused to give greater weight to Mississippi policy favoring recovery for victims of tort and the declared Mississippi policy of applying forum remedial laws in product liability cases, applying Tennessee's statute of repose instead. Allison v. ITE Imperial Corp., 928 F.2d 137, 145 (5th Cir. 1991).

[395] *But see* Gann v. Fruehauf Corp., 52 F.3d 1320 (5th Cir. 1995) (holding under Mississippi choice-of-law rules that place of employment and most wrongful conduct should apply rather than place where employee was terminated in wrongful discharge case). The court evaluated the state interests and concluded that Washington's law was not offensive to Mississippi, *Gann*, 52 F.3d at 1325 n.4, and that nonapplication of Washington law would unnecessarily frustrate its state interest while not significantly advancing any important Mississippi interest, *id.* at 1325.

[396] *Erie*, 304 U.S. at 76.

[397] The federal courts may rightly protest that the problem lies with the lack of precise rules articulated by the Mississippi Supreme Court. But Mississippi is not required to develop such precise rules for the convenience of federal courts, and the whole point of the Restatement Second approach, for better or worse, is to avoid rigid rules. The federal courts' desire for such rules, and the de facto emergence of a separate body of federal choice-of-law rules in Mississippi may

When a valid federal statute or Federal Rule of Civil Procedure or Evidence provides a uniform rule, it applies. For this reason, federal courts not only may enforce forum-selection clauses in cases within admiralty jurisdiction but may do so in granting transfers between federal districts authorized by federal statute, even though such agreements may not be enforceable under Mississippi state law.[398] In contrast, many federal statutes and rules expressly incorporate state law.[399]

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represent an unconstitutional exercise of federal judicial rule-making authority. *Cf.* U.S. CONST. amend. X (stating power not delegated to federal government is reserved to states or to people); *Erie*, 304 U.S. at 78 (holding there is no constitutional authority for federal general common law making authority). *But see id.* at 91 (Reed, J., concurring in result only on statutory grounds).

The tension between the state courts' effort to elaborate a coherent body of choice-of-law law rooted in accommodating conflicting state policies and the federal courts' penchant for specific and predictable rules seems to reflect an underlying tension between demands for coherence and determinacy that may not be reconcilable. William A. Edmundson, *The Antinomy of Coherence and Determinacy*, 82 IOWA L. REV. 1, 1-20 (1996).

[398] *See supra* notes 350-53 and accompanying text.

[399] *E.g.*, 28 U.S.C. § 1652 (1994) (adopting state law rules of decision in cases where they apply); 28 U.S.C. § 1962 (1994) (requiring effect of federal judgment on property lien to accord with state laws); 28 U.S.C. § 2007 (1994) (abolishing imprisonment for debt where such imprisonment abolished by state law and adopting state law regarding jail privileges for imprisoned debtors); 42 U.S.C. § 1988 (1994) (adopting state remedies to supplement federal in civil rights cases); FED. R. CIV. P. 4(k)(1)(A) (adopting reach of state long-arm jurisdiction of state where court sits); *id.* 4(e)(1) (adopting method of service of state where court sits or state where service made); *id.* 4(g) (adopting state requirements for service upon infants and incompetents); *id.* 17(b) (requiring capacity of individual to be party determined by law of his or her domicile, of corporation by law of place of incorporation, of others by law where district court sits except for partnership); *id.* 28(a) (requiring deposition to be taken before person appointed by court or person authorized to administer oaths by law of United States or law of place of deposition); *id.* 62(f) (adopting law of state where court sits regarding stays of execution when judgment operates as property lien); *id.* 64 (adopting state law regarding pre-judgment arrest or attachment of property); *id.* 69(a) (adopting state law for execution of judgments); *id.* 71A(k) (adopting state rules regarding trial by jury in actions under state eminent domain power); FED. R. EVID. 302 (adopting state law regarding effect of presumption on burden of establishing claim or defense for cases based on state law), *id.* 501 (adopting state law of privilege in cases based on state law).

B. *Federal Torts Claim Act*

In claims brought against the United States government in federal court under the Federal Torts Claim Act,[400] the court will apply the choice-of-law rules of the place where the government's act or omission occurred.[401] When the act or omission occurred in Mississippi, Mississippi choice-of-law rules will govern a wrongful death action even when the death occurred in another state.[402]

C. *Admiralty Cases*

Cases within federal admiralty jurisdiction are governed by federal choice-of-law rules that consider 1) the place of the wrongful act, 2) the law of the flag, 3) the allegiance or domicile of the injured worker, 4) the allegiance of the defendant shipowner, 5) the place of the contract, 6) the inaccessibility of the foreign forum, 7) the law of the forum, and 8) the shipowner's base of operations.[403] The judicial evaluation of these factors is similar to the Restatement Second approach. They are not counted mechanically, but "the significance of each factor must be considered within the particular context of the claim and the national interest that might be served by the application of United States law."[404]

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[400] The Federal Torts Claim Act comprises a limited waiver of federal sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b) (1994).

[401] Richards v. United States, 369 U.S. 1, 11 (1962). The Supreme Court found the word "law" in the Federal Torts Claims Act ambiguous because it might mean either 1) the whole law, including the conflict-of-laws rules, of the place of negligence or 2) the internal law of the place of negligence. *Richards*, 369 U.S. at 10. It held, "we conclude that a reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred." *Id.* at 11.

[402] Carney v. United States, 634 F. Supp. 648, 651 (S.D. Miss. 1986), *aff'd mem.*, 813 F.2d 405 (5th Cir. 1987).

[403] Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 308-09 (1970) (quoting Lauritzen v. Larsen, 345 U.S. 571, 583-91 (1953)).

[404] Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1119 (5th Cir. 1995) (quoting Fogleman v. ARAMCO, 920 F.2d 278, 282 (5th Cir. 1991)). Thus the place of the tort, the allegiance or domicile of the plaintiff, and the place of contract are more

VI. CONSTITUTIONAL LIMITATIONS

A. *Requirement That State Must Have Significant Contact For Its Law to Apply*

Mississippi courts routinely apply Mississippi law despite prevalent contacts in other states when an issue is procedural,[405] when strong Mississippi policies favor application of forum law,[406] and when statutes so require.[407] Yet it may constitute a taking in violation of a party's due process rights[408] for a court to apply Mississippi law in a case in which there are no contacts with Mississippi, other than jurisdiction, and in which Mississippi has no interest in applying its law.[409]

Earlier this century, the Supreme Court held that substantive due process prevented the disregard of rights that had vested under traditional territorial choice-of-law principles[410]

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important in claims arising from injuries suffered in connection with offshore oil production than in traditional "bluewater" shipping case. *See* Coats v. Penrod Drilling Corp., 5 F.3d 877, 887 (5th Cir. 1993) (holding that United States law applied to claims arising from injuries suffered in United Arab Emirates waters where allegiance of plaintiff and defendant shipowner pointed to United States, plaintiff was recruited in United States and supervised by United States citizen employees, and contract was entered into in United States).

[405] *See supra* notes 117-52 and accompanying text.

[406] *See supra* notes 371-85 and accompanying text.

[407] *See supra* note 319 and accompanying text.

[408] *See* U.S. CONST. amend XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . "); U.S. CONST. amend V ("[N]or shall any person be deprived of life, liberty, or property, without due process of law . . . . "); MISS. CONST. art. III, § 14 ("No person shall be deprived of life, liberty, or property except by due process of law.").

[409] In *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930), the Court held that due process prevented Texas from applying its statutory policy against contracts for shorter limitations in a lawsuit stemming from a fire insurance contract entered into in Mexico by Mexican parties to cover a vessel operated in Mexican waters. The only Texas contact was the fact that the insurance policy had been assigned to a nominal Texas resident. *Dick*, 281 U.S. at 410. Quasi in rem jurisdiction was obtained in Texas by attaching the insurer's reinsurers. *Id.*

[410] *See* Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 149-50 (1934) (holding that Mississippi could not apply its own statute to invalidate contractual rights that vested elsewhere); New York Life Ins. Co., v. Dodge, 246 U.S. 357, 373-74 (1918) (holding that due process prevented Missouri from applying Missouri nonforfeiture statute to insurance policy accepted in New York). *But see* Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 214 (1922) (holding

and that the Full Faith and Credit Clause[411] prohibited a state from applying its law to a transaction in disregard of the law of another state when the underlying transaction had nothing to do with the forum state.[412] But by 1939 it was clear that due process did not prevent more than one state's law being applied to a case with multi-state elements.[413] A state's law could be constitutionally applied when events giving rise to the cause of action occurred in the state.[414] And the Court subsequently held that neither due process nor full faith and credit prevented application of forum law in a case where the forum state had an interest.[415]

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that Missouri nonforfeiture clause could be applied but only because loan to which it applied had been formed in Missouri).

[411] *See supra* note 4.

[412] *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 183 (1936) (holding under Full Faith and Credit Clause that Georgia state court could not apply forum law and leave issue of fraud to jury when law of New York, where insurance policy was issued and where insured resided at time of contract, provided that insured's concealment of illness provided complete defense). *See also* SCOLES & HAY, *supra* note 15, § 3.28, at 96 (discussing case). For discussions of the history of the Court's constitutional choice-of-law jurisprudence, see *id.* §§ 3.20-3.25, at 78-93. *See generally* RICHMAN & REYNOLDS, *supra* note 15, §§ 91-93, at 269-74; WEINTRAUB, *supra* note 133, § 9.2A, at 512-25; Ralph U. Whitten, *The Constitutional Limitations on State-Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1 (1981); Ralph U. Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses*, 14 CREIGHTON L. REV. 499 (1981).

[413] *See* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939) (holding that state where accident occurred could apply its law instead of workers' compensation law of state of employment); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 540 (1935) (holding that state where employment relationship was entered could apply its workers' compensation law to claims arising from accident in another state).

[414] *Pacific Employers Ins. Co.*, 306 U.S. at 501.

[415] Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 181 (1964) (holding that neither Due Process nor Full Faith and Credit Clauses prevented Florida from applying its law and disregarding contractual limitation that was valid under law of place of contracting in insurance claim by insured who moved to Florida after obtaining policy and then suffered losses in Florida); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 73 (1954) (holding that neither Due Process nor Full Faith and Credit Clauses prevented Louisiana from permitting direct action against tortfeasor's insurer despite no-action clause in contract that was valid under law of state of contracting reasoning that Louisiana had legitimate interest in safeguarding persons injured in state).

The present constitutional limits on state choice of law are set forth in *Allstate Insurance Co. v. Hague*.[416] The Court reviewed the history of decisions imposing limits on choice of law under both the Due process Clause and Full Faith and Credit Clause and came up with a single test: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[417] Students familiar with the evolution of the Supreme Court's construction of the "minimum contacts" standard in *International Shoe*[418] have pointed out that the rhetorical formulation in *Hague* might similarly be construed to require a two-part analysis: first, a finding that the state have a significant contact creating a state interest; and second, a finding that application of its law is not arbitrary or unfair.

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[416] 449 U.S. 302 (1981). In *Hague* the Court held that Minnesota could apply its law allowing stacking of uninsured motorist coverage to an accident that occurred in Wisconsin when 1) decedent was member of Minnesota's work force and commuted there regularly, 2) defendant was present and doing business in Minnesota, and 3) plaintiff moved to Minnesota after accident but prior to commencing litigation. *Hague*, 449 U.S. at 313-18.

[417] *Id.* at 312-13.

[418] International Shoe Co. v. Washington, 326 U.S. 310 (1945). In that case, the Court stated:

> But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.

International Shoe Co., 326 U.S. at 316 (citation omitted).

Subsequent decisions returned to this general, descriptive language, took it out of context, and erected it into a requirement of "minimum contacts." Hanson v. Denckla, 357 U.S. 235, 251 (1958). Subsequently, the Court returned to the language of *International Shoe* and discovered a two-part test of (1) minimum contacts plus (2) fairness. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). The evolution of this passage from *International Shoe* into a formulaic test and the apotheosis of minimum contacts is ironic given the fact that the language was originally part of the Court's criticism of the reification of presence and doing-business under prior cases.

The Court that announced the *Hague* standard formulated it with conscious reference to the language of minimum contacts—"significant" requiring something more than "minimum." Students are thus right to worry that future cases may return to this general language and look for clauses as sources of subrules.

While minimum contacts sufficient for personal jurisdiction are not enough to permit a court to apply its law to a case, the plurality in *Hague* reasoned that such contacts together with the fact that the plaintiff established residency in the state after the cause of action and the fact that the decedent had been employed in the state added up to a significant aggregation of contacts.[419] The dissent agreed with *Hague*'s significant contact standard but concluded that the standard was not satisfied under the facts.[420]

The Court subsequently applied the significant contact standard to hold that Kansas courts were constitutionally prohibited from applying Kansas equity law to fix the interest rate governing all claims in a class action for back payment of interest for mineral royalties where less than 1000 of the 28,100 class members resided in Kansas and only one-quarter of one percent of the gas leases were in Kansas.[421] Neither the defendant's presence in the state, nor its minimum contacts with the forum unrelated to the issues in the case, nor the forum's procedural interest in the convenience of applying its own laws were enough, by themselves, to make constitutional the application of its law.[422]

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[419] *Hague*, 449 U.S. at 313-20. The four-vote plurality decision was sufficient to support the affirmance because Justice Stewart did not participate. *Id.* at 320. In addition, Justice Stevens voted to affirm, but did so without adopting the test approved by both the plurality and dissenting opinions. *Id.* at 332.

[420] *Id.* (Powell, J., dissenting). *See also* SCOLES & HAY, *supra* note 15, § 3.23, at 83-87 (criticizing reasoning of plurality opinion in *Hague*). In favor of the plurality's reasoning, it should be noted that everyone would agree that Minnesota law could apply, had the decedent been a resident. In fact, however, the decedent as a member of Minnesota's work force commuting daily to the state arguably had more real presence in the state and contributed more to the local economy, establishing a basis for the assertion of Minnesota state interests in protection and compensation, than had many legal residents with attenuated ties to the state.

[421] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985) ("Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits."). The Court's emphasis on the small percentage of plaintiffs and mineral leases in Kansas suggests that the evaluation of contacts requires a comparison of respective contacts in other states. *Shutts*, 472 U.S. at 815.

Nevertheless, even when a state lacks sufficient contacts creating state interests to permit it constitutionally to apply its substantive law in a case, a state may still apply its own statute of limitations.[423] Justice Scalia explained that full faith and credit does not prevent a state from applying its own procedural rules and found that statutes of limitations are procedural because "[t]he historical record shows conclusively . . . that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions . . . but rather as procedural restrictions . . . . "[424] He likewise found that application of the forum's statute of limitations did not violate due process because of the longstanding historical practice of courts applying forum statutes of limitations.[425] While relying principally on the distinction between substance and procedure, Justice Scalia also noted that states had legitimate interests in regulating their courts' dockets and that no party could be surprised "by the application to it of a rule that is as old as the Republic."[426] Three justices concurred in holding that a court was free to apply its own limitations period but did so by applying the significant contact standard, finding that pendency of litigation in the forum, together with the forum's interest in controlling access to its courts, created a state interest making application of forum limitations law constitutional.[427]

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[422] The cases illustrate how state courts applying modern choice-of-law theories may find themselves selecting the law of a state with which the litigation has no significant contact. In *Shutts*, the Supreme Court of Kansas concluded that the different state interest rates presented a "false conflict" (i.e., that other states had no real interest in having their interest rate govern the case). *Id.* at 818. Under the theory of interest analysis and other modern theories, forum law should apply in a case of false conflict. In *Hague*, the Minnesota District Court likewise characterized the case as presenting a false conflict and applied forum law, but the Minnesota Supreme Court concluded that forum law represented the "better rule of law." *Hague*, 449 U.S. at 306-07.

Because the constitutional standard requires that the forum have an interest in applying its law, none of these cases should presumably have been characterized as false conflicts. Rather, at most, they present the "unprovided for case," so-called because Currie's theory of governmental interest analysis did not provide an adequate theoretical solution to formal conflicts in which, upon analysis, it is discovered that *neither* state has an interest in applying its law. Currie himself suggested that forum law should always apply in default, including in cases where there is a true conflict between the laws of two foreign states but the forum has no interest. Brainerd Currie, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1242-43 (1963).

It is now clear that Currie's proposal of applying forum law in default in certain cases where the forum has no significant contact creating a state interest is unconstitutional. It is also clear that the mere pendency of proceedings in the forum gives the forum court an insufficient interest in applying its conflicts rules. But the Supreme Court cases suggest strongly that there will not be a constitutional unprovided-for case where no state's law may apply because no state has an interest. It seems that the state where the cause of action accrued will always have a significant contact creating a state interest so that its law may apply. *See supra* note 414 and accompanying text.

[423] Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988). Under facts essentially identical to those in *Phillips Petroleum*, the Court ruled that even though Kansas was constitutionally prevented from applying its substantive interest rates to the claims, it was not prevented from applying its own statute of limitations. *Wortman*, 486 U.S. at 722. The Court stated "[t]his Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State . . . . We conclude that our prior holdings are sound." *Id.*

According to Justice Scalia's reasoning, Mississippi's practice of applying forum law to all matters of procedure and remedy will be constitutional, at least as long as Mississippi's characterization of an issue as procedural comports with longstanding historical practices. It would be reassuring to know that every application of forum procedural law is constitutional. Unfortunately, it is not yet certain that Justice Scalia's broad rule states the law of the land.[428] First, it is not clear that Justice Scalia's opinion commanded the support of the majority.[429] Second, the Court's holding concerned statutes of limitations, for which there was considerable prior precedent, and the broad language about procedure is ultimately dictum that may not be followed in other cases.[430] Third, the reasoning of the concurring opinion, together with Justice Scalia's reference to considerations such as the forum's interest in regulating its docket and the lack of surprise in applying forum statutes of limitations, demonstrate that such statutes presented the Court with a relatively easy constitutional issue—one in which no important policies weighed against application of forum limitations periods. Other issues characterized as procedural like immunities or presumptions are more problematic, and the Court in an older holding itself refused to permit forum law to apply to at least one issue characterized as procedural, the division between judge and jury.[431]

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[424] *Id.* at 726 (citing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 462-63 (2d ed. 1832)).

[425] *Wortman*, 486 U.S. at 730. Justice Scalia stated that "[a]t the time the Fourteenth Amendment was adopted, this Court had not only explicitly approved (under the Full Faith and Credit Clause) forum-state application of its own statute of limitations, but the practice had gone essentially unchallenged. And it has gone essentially unchallenged since." *Id.*

Justice Scalia's opinion reveals a significant bias (perhaps unintended) towards the forum court's characterization. For example, he did not consider the fact that legislation in Mississippi as old as the due process cases provides that its statutes of limitations are substantive. *See supra* note 23.

[426] *Wortman*, 486 U.S. at 730.

[427] *Id.* at 737 (Brennan, J., concurring). Justice Brennan's analysis distinguished between cases where a forum applied its shorter statute of limitations and cases where a forum continued to hear a case under a longer forum statute. *Id.* (Brennan, J., concurring). He argued that the forum's interest in avoiding stale claims easily supported the conclusion that it had a sufficient contact to apply its own, shorter limitations period. *Id.* (Brennan, J., concurring). Where the forum's limitations period is longer, he found the analysis more complicated, but found nevertheless that the lack of clear indications of a conflict with foreign state interests in repose together with the longstanding judicial practice of applying forum law supported the holding that the forum was free to apply its longer statute of limitations. *Id.* (Brennan, J., concurring).

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[428] *See* SCOLES & HAY, *supra* note 15, § 3.23 at 5 (Supp. 1995) ("Taken to its natural stopping point . . . , [Justice Scalia's opinion in *Sun Oil Co. v. Wortman*] leads to the conclusion that all traditional choice-of-law rules are constitutional. Whether *Wortman* will be so extended—or limited to the statute of limitations context—remains to be seen.").

[429] Justices Brennan, Marshall, and Blackmun expressly rejected the rule that any longstanding choice-of-law rule was automatically constitutional. *Wortman*, 486 U.S. at 740 (Brennan, J., concurring). Justice O'Connor, joined by Chief Justice Rehnquist, did not expressly disagree with Justice Scalia's rule of historical validation. *Id.* at 743 (O'Connor, J., concurring). But she pointed out that "[d]ifferent issues might have arisen if Texas, Oklahoma, or Louisiana regarded its own shorter statute of limitations as substantive." *Id.* (O'Connor, J., concurring). It is not clear whether this difference would be important because it might indicate a stronger policy in the foreign state in application of its limitations or whether such a characterization might have fallen into the exception under which certain statutes of limitations were deemed substantive under longstanding practice. This problem was not addressed but would be confronted by a foreign court faced with claims that have expired under a Mississippi statute of limitations. Mississippi, by statute, makes the expiration of limitations "substantive" by providing that "it extinguish[es] the right as well as the remedy." MISS. CODE ANN. § 15-1-3 (1995). Justice Scalia thought that cases enforcing promises to repay debts barred by the statute of limitations provided authority for characterizing limitations as procedural. *Wortman*, 486 U.S. at 725. But Mississippi's statute permits enforcement of promises to repay but nevertheless provides that the underlying debt is extinguished. *See* MISS. CODE ANN. § 15-1-3 (1995), *supra* note 23.

[430] Statutes of limitations were easier to decide, for there was precedent on the issue. *E.g.*, Wells v. Simonds Abrasive Co., 345 U.S. 514, 516-18 (1953); Townsend v. Jemison, 50 U.S. 407, 413-20 (1850); M'Elmoyle v. Cohen, 38 U.S. 312, 327-28 (1839). In other cases, however, the Court refused to uphold application of forum law despite the possible characterization of the issue as one of procedure. *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 181-82 (1936) (holding that Georgia state court could not leave issue to jury notwithstanding possible

Some Mississippi choice-of-law rules that routinely apply Mississippi law neither claim long historical pedigree nor can be deemed procedural for purposes of constitutional analysis. For such rules to apply constitutionally, the *Hague* standard must be satisfied. There must be a significant contact or a significant aggregation of contacts creating a Mississippi state interest in applying its law so that application of its law is fair and reasonable. Of course, most applications of Mississippi law will satisfy this standard. It will be constitutional to apply Mississippi law to causes of action that arise in Mississippi and to actions that arise out of state that involve Mississippi residents. Nevertheless, possible problems may arise with respect to the Mississippi Uniform Commercial Code, which seeks to preempt other states' products liability laws, and with respect to Mississippi's practice of applying its comparative negligence statute as a matter of policy in cases where the accident occurs

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characterization of issue of division of labor between judge and jury as matter of procedure); Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930) (holding that Texas could not apply its statutory policy against contracts for shorter limitations, looking at effect of decision on parties in rejecting characterization of issue as procedural). Neither the majority nor the concurring opinions in *Sun Oil Co. v. Wortman* discussed *Yates*.

Writing a few years prior to Justice Scalia's opinion, Weintraub insisted: "A court ought not to be able to escape the mandate of full faith and credit through the device of classifying the rule that it wishes to apply as 'procedural.'" WEINTRAUB, *supra* note 133, § 9.3D (discussing several Supreme Court cases and explaining why *Wells* does not require a different result).

[431] *Cf. Yates*, 299 U.S. at 183. *See supra* note 430.

out of state and there are overwhelming contacts in some other state.[432]

B. *Choice-of-Law Rules That Discriminate Against Foreign Parties*

Mississippi conflicts law favors Mississippi residents in several situations. For example, when a cause of action accrues in another jurisdiction and the cause of action would be time barred by that jurisdiction's statute of limitations but not by Mississippi's, the Mississippi borrowing statute allows Mississippi residents to bring a claim, but not nonresidents.[433] Similarly, an Alabama passenger injured in Mississippi was required to prove wanton misconduct by the Alabama trucking company for its acts in Alabama while a Mississippi passenger might not have needed to prove more than ordinary negligence.[434] The application of less favorable law against a party due to the party's domicile or residence raises equal protection and privileges and immunities issues that have not yet been authoritatively resolved.

1. *Equal protection*

The Equal Protection Clause[435] prevents states from discriminating against all persons, including aliens[436] and corporations,[437] based on their domicile or residence unless the differing treatment is designed to achieve a legitimate state purpose and is rationally related to achieving that purpose.[438] In older cases the Supreme Court upheld a variety of state laws that discriminated against nonresidents,[439] while striking some procedural disadvantages as unconstitutional.[440] It is hard to reconcile the older decisions; moreover, equal protection law has evolved significantly in the half-century since many of the cases were decided.

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[432] Mississippi may constitutionally apply its comparative negligence statute to actions stemming from torts that occur in Mississippi. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939). But it will be harder to show that Mississippi has a state interest in applying its comparative negligence statute to torts that occur out-of-state and that involve residents of other states.

[433] MISS. CODE ANN. § 15-1-65 (1995); *see supra* note 91 and accompanying text.

[434] Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975) (holding that Alabama law governed claim by Alabama passenger against Alabama employer of Alabama truck driver for driver's negligence in causing accident in Mississippi). The actual facts of this case suggest strongly that its holding should be construed more narrowly than its somewhat broad dictum. *See supra* note 124.

[435] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.") *See also* MISS. CONST. art. III, § 24; *supra* note 81 (quoting text).

[436] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that equal pro-

A few more recent decisions have found choice-of-law distinctions based on residence or domicile permissible.[441] Though there is considerable scholarship on the problem,[442]

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tection applies to citizens and aliens).

[437] *See* Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181, 189 (1888) (holding that equal protection applies to corporations).

[438] Classifications based on residence do not implicate fundamental rights; so their constitutionality is measured under the less searching rationally-related test. *See generally* SCOLES & HAY, *supra* note 15, § 3.34, at 107-08.

[439] *See, e.g.*, Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361, 364 (1933) (permitting substituted service without notice upon nonresident corporations), *overruled by* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950).

[440] *See, e.g.*, Power Mfg. Co. v. Saunders, 274 U.S. 490, 493 (1927) (holding state venue law unconstitutional which discriminated against foreign corporations).

[441] *Accord* Holly v. Maryland Auto Ins. Fund, 349 A.2d 670, 674 (Md. 1975) (holding that refusal to extend certain benefits to nonresidents whose state did not reciprocate did not violate Equal Protection or Privileges and Immunities Clause); Moan v. Coombs, 221 A.2d 10, 12 (N.J. 1966) (holding that refusal to extend certain benefits to nonresidents whose state did not reciprocate did not violate Equal Protection Clause); Law v. Maercklein, 292 N.W.2d 86, 90 (N.D. 1980) (holding that denial of recovery from state fund to nonresident did not violate Privileges and Immunities Clause). *Cf.* Skahill v. Capital Airlines, Inc., 234 F. Supp. 906, 908 (D.N.Y. 1964) (holding New York choice-of-law rule that disregarded cap on damages for residents did not violate rights of nonresident under Equal Protection or Privileges and Immunities Clauses).

[442] Proponents of modern choice-of-law rules recognized the potential for equal protection and privileges and immunities problems. *See generally* Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Larry Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 RUTGERS L. REV. 523 (1959). Currie suggested that territorial rules that denied a resident a recovery based solely on the place of the wrong might itself violate the Equal Protection Clause. CURRIE, *supra* note 248,

the scholars themselves are divided. Some scholars argue that equal protection broadly prohibits choice-of-law rules that discriminate on the basis of domicile or residence.[443] Another scholar argues that a choice-of-law rule that discriminates on the basis of domicile or residence is constitutional.[444] Yet another assumes that a choice-of-law rule that discriminates on the basis of domicile or residence is constitutional as long as the adverse law is the same that would be applied by the nonresident's home state's courts.[445]

In *Metropolitan Life Insurance Company v. Ward*,[446] the Supreme Court held that Alabama's higher tax rates on out-of-state insurance companies violated the Equal Protection Clause.[447] The Court required that the statutory distinction between residents and nonresidents both 1) advance a legitimate state purpose and 2) be rationally related to the purpose.[448] The trial court found two legitimate state purposes for the legislative classification: encouraging formation of new Alabama insurance companies[449] and encouraging capital investment in Alabama securities.[450] But the Supreme Court re-

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at 577.

[443] *See generally* SCOLES & HAY, *supra* note 15, § 3.34, at 108 (assuming even procedural distinctions are unconstitutional); Peter D. Isakoff, Note, *Unconstitutional Discrimination in Choice of Law*, 77 COLUM. L. REV. 272 (1977); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U. L. REV. 431 (1987).

[444] *See* RICHMAN & REYNOLDS, *supra* note 15, § 96[c], at 286 ("An equal protection challenge to a choice-of-law decision is likely to fail, therefore, unless strict scrutiny is applied.").

[445] WEINTRAUB, *supra* note 133, § 9.4, at 571-72.

[446] 470 U.S. 869 (1984).

[447] *Ward*, 470 U.S. at 883. To avoid the adverse treatment, an insurance company had to *both* incorporate in Alabama and maintain its chief place of business in the state. *Id.* at 871 n.2. Foreign companies could lower the additional tax imposed on them (but not eliminate it) by investing in certain Alabama securities. *Id.*

[448] *Id.* at 875. *See generally* 3 RONALD ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 18.3, at 22-41 (1992) (discussing recent treatment of rational relationship test).

[449] *Ward*, 470 U.S. at 873.

[450] *Id.*

versed, concluding that the advancement of purely local economic interests by discriminating *against* foreign interests was not legitimate.[451] The Court did not consider whether the means chosen were rationally related to achieving the state's purpose.[452]

Key to surviving an equal protection challenge will be identifying a legitimate state interest behind the classification. For example, it can be argued that the discrimination against nonresident plaintiffs in the Mississippi borrowing statute advances a forum interest of deterring forum shopping.[453] So, too, it can be argued that applying the foreign limitations period against foreign plaintiffs under the Mississippi borrowing statute advances legitimate Mississippi interests in encouraging comity and reciprocity.[454] Similar arguments can be advanced to support the judicial practice under the Restatement Second in which substantive choice-of-law rules in some cases favor Mississippi residents.

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[451] *Id.* at 882 ("We hold that . . . promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose."). The Court also stated "[w]e do not agree that this [second interest] is a legitimate state purpose when furthered by discrimination." *Id.*

The dissenting justices protested that the Court misapplied the rationally related test, confusing the validity of state interests with the issue of whether the discriminatory classification advanced those state purposes. *Id.* at 885 (O'Connor, J., dissenting). For the dissent, the economic purposes advanced by the Alabama statute were obviously legitimate. *Id.* at 883 (O'Connor, J., dissenting).

[452] Because the foreign insurers had waived the issue of rational relationship in order to appeal to the Alabama Supreme Court, the only issue presented to the Supreme Court was the legitimacy of the asserted state interests. *Id.* at 873-75.

[453] SCOLES & HAY, *supra* note 15, § 3.33, at 106. Nevertheless, the argument itself assumes that it is valid to discriminate against forum shoppers on the basis of residence, which itself must be explained as advancing some legitimate state interest. The Supreme Court has permitted nonresidence to be taken into account in granting forum non conveniens dismissals. *Cf., e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (holding that trial court properly dismissed action on grounds of forum non conveniens in part because plaintiff's choice of forum was entitled to little weight when plaintiff was nonresident, but not considering whether such distinction violated Equal Protection Clause).

[454] The argument that a plaintiff is not constitutionally injured when the case is decided under the law of the plaintiff's residence sounds plausible. But it is a questionable basis for an exception to the requirement that the forum state treat persons equally, especially where the plaintiff's foreign national law is repugnant to local notions of basic fairness. It is questionable whether special deference to the law of sister states would be permitted. Even under the Privileges and Immunities Clause, the Court rejected the argument that New Hampshire's tax on

Other legislation may be harder to defend. It may be hard to find a legitimate state purpose for the shorter statute of limitations for foreign judgments against Mississippi residents because Mississippi statutes provide a longer period for enforcing Mississippi judgments against the same class of defendants.[455] A *longer* limitations period for claims on foreign judgments against Mississippi residents might advance legitimate interests by assuring a remedy on the theory that non-Mississippi residents would be less likely to have assets in state necessary to satisfy the foreign judgment. In the absence of any legislative history or explanation in the cases, the suspicion is unavoidable that the discrimination goes back to days of parochial protectionism of local interests and may not survive constitutional challenge.

2. *Privileges and immunities*

The Privileges and Immunities Clause proclaims: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."[456] This clause has less scope than the Equal Protection Clause because it only applies to "citizens" of states, which do not include aliens or corporations,[457] and because it applies only to rights that bear

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Maine residents who worked in New Hampshire was not unconstitutional because, after their home state tax credit was taken into account, they were not subjected to higher taxes than would otherwise be imposed by the law of their state of residence. Austin v. New Hampshire, 420 U.S. 656, 659 n.4, 660 n.4, 665-66 (1975). The Court acknowledged the value of reciprocity but suggested it did not justify the "unilateral imposition of a disadvantage upon nonresidents . . . ." *Austin*, 420 U.S. at 667 n.12.

[455] *See supra* notes 79-83 and accompanying text.

[456] U.S. CONST. art. IV, § 2, cl. 1. There are actually two clauses. *See also* U.S. CONST. amend. XIV § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

[457] *See* Blake v. McClung, 172 U.S. 239, 258 (1898); Paul v. Virginia, 75 U.S. 168, 178-81 (1868), *overruled in part on other grounds by* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (holding the "business of insur-

on the vitality of the nation as a whole.[458]

Older Supreme Court decisions held that certain procedural advantages accorded to residents, such as a shorter limitations period for nonresident plaintiffs, were not matters of such great importance so as to raise a privileges and immunities issue.[459] Some scholars have assumed the clause has no bearing on decisions to apply law based on the citizenship of a party in choice-of-law cases.[460]

In *Austin v. New Hampshire*,[461] the Supreme Court held that a state tax scheme that imposed income tax only on nonresidents violated the Privileges and Immunities Clause because the class of nonresidents included citizens of other states,

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ance" is commerce for purposes of commerce clause). The exclusion of corporations is an artifact of antiquated constitutional jurisprudence that recognized the power of states to exclude corporations altogether.

[458] *See* Baldwin v. Fish & Game Comm'n, 436 U.S. at 383, 388 (1978) (holding that higher fee for nonresident hunting and fishing license did not violate privileges and immunities because clause only protected rights that bore on "vitality of Nation" as whole). *But see* Barnard v. Thorstenn, 489 U.S. 546, 559 (1989) (holding residency requirement for admission to Virgin Islands Bar violated Privileges and Immunities clause); Supreme Court v. Friedman, 487 U.S. 59, 70 (1988) (holding residency requirements for admission to state bar violated Privileges and Immunities Clause); Hicklin v. Orbeck, 437 U.S. 518, 526 (1978) (holding state hiring preference for residents violated privileges and immunities of citizens of other states).

[459] *See* Canadian N. Ry. v. Eggen, 252 U.S. 553, 562 (1920) (holding discrimination against nonresidents was not matter of great importance so as to raise privileges and immunities issue as long as nonresident had reasonable time to bring the suit). Statutes of limitations tolling claims against absent defendants for residents but not for nonresidents did not violate privileges and immunities rights. Chemung Canal Bank v. Lowery, 93 U.S. 72, 78 (1876). A more recent decision reached a similar result on equal protection grounds. G.D. Searle & Co. v. Cohn, 455 U.S. 404, 412 (1982) (holding statute tolling limitations for claims against foreign corporation without in-state agent did not violate Equal Protection or Due Process Clause because increased difficulty of service provided rational basis for tolling), *vacated*, 784 F.2d 460 (1986). *But cf.* Haughton v. Haughton, 394 N.E.2d 385, 389 (Ill. 1979) (tolling statute applying only against nonresident held to violate equal protection). *See generally* WEINTRAUB, *supra* note 133, § 3.2C, at 59 n.54 (opining that statute of repose exception in favor of forum residents does not violate Equal Protection Clause but citing *Eggen* as sole federal authority).

[460] *E.g.*, RICHMAN & REYNOLDS, *supra* note 15, § 96[b], at 286 ("It is unlikely . . . that the Privileges and Immunities Clause will be held to limit significantly state decisions in choice of law."); WEINTRAUB, *supra* note 133, § 3.2C, at 59 n.54.

[461] 420 U.S. 656 (1975).

and the tax scheme failed to accord "substantial equality of treatment" in taxing residents and nonresidents.[462] The special tax on nonresidents would have been permissible if it had been designed to equalize tax treatment by compensating for other local taxes paid disproportionately by residents.[463] Although the case was concerned specifically with discriminatory taxing schemes, which had historically been viewed with special concern under the privileges and immunities cases,[464] the Court emphasized that the Privileges and Immunities Clause served both to protect individuals from discriminatory treatment and to protect "the structural balance essential to the concept of federalism"[465] by protecting non-citizens from discriminatory legislation in which they cast no vote.[466]

Under the reasoning of *Austin*, protectionist legislation that discriminates in favor of Mississippi residents, such as statutes of limitations,[467] may be particularly vulnerable to privileges and immunities challenges. If such legislation is found to be unconstitutional, however, it would be preferable to base the finding on equal protection grounds rather than privileges and immunities so that different statutes of limitations would not apply to natural persons and corporations.[468]

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[462] *Austin*, 420 U.S. at 665.

[463] The Court found that the tax was "not offset even approximately by other taxes imposed upon residents alone." *Id.*

[464] *Id.* at 660-61.

[465] *Id.* at 662.

[466] *Id.*

[467] *See supra* note 99.

[468] One wonders whether the logic behind the Court's concern with legislative protectionism should not extend to the elected judiciary. *Cf.* MISS. CONST. art. 6, § 145 (providing for election of supreme court justices). If so, the judicial adoption of choice-of-law rules that adversely affect nonresidents may also be vulnerable to privileges and immunities challenge.

VII. SOVEREIGN IMMUNITY[469]

A. *Actions Against Foreign Countries*

The federal Foreign Sovereign Immunities Act accords extensive sovereign immunity to foreign countries.[470] Limited exceptions to immunity include: tort claims for acts committed in the United States resulting in death, personal injuries, or property damages;[471] official acts of torture, murder, or terrorism against United States nationals by states designated as state sponsors of terrorism;[472] acts performed in the United States in connection with commercial activity in the United States and acts performed outside the United States in connection with commercial activity outside the United States that have a direct effect in the United States;[473] certain property disputes involving property located in the United States;[474] and certain actions to enforce maritime liens.[475]

When immunity does not bar a claim, a foreign country is liable for actual damages "in the same manner and to the same extent as a private individual under like circumstances,"[476] but punitive damages are not available.[477] Because the exclusion of punitive damages would prevent any recovery under the law of jurisdictions that construe wrongful death awards as punitive, the statute permits a recovery in such instances but "measured by the pecuniary injuries resulting from such death."[478]

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[469] For choice-of-law rules in claims against the United States government, see supra notes 400-02 and accompanying text.

[470] Under the Foreign Sovereign Immunities Act, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (1994).

[471] *Id.* § 1605(a)(5). This does not include claims based on discretionary functions and certain intentional torts. *Id.* § 1605(a)(5)(A)(B) (Supp. 1997).

[472] *Id.* § 1605(a)(7) ("personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . . ."). The court must decline to hear the claim if the state is not designated a sponsor of terrorism or if the claimant has not followed applicable international arbitration rules.

[473] *Id.* § 1605(a)(2). Commercial activity is interpreted narrowly. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 363 (1993) (construing commercial activity restrictively and barring American employee's tort claim).

[474] 28 U.S.C. § 1605(a)(3) & (4) (1994).

[475] *Id.* § 1605(c).

[476] *Id.* § 1606.

The Act creates a cause of action by incorporating the same substantive law that would apply in a claim against a private individual and apparently leaves states no room to permit greater immunity to foreign sovereigns than that provided by the Act. It is unlikely that many cases will be litigated in state court,[479] but the Mississippi choice-of-law rules applicable to private individuals should apply to claims against foreign countries brought in Mississippi state courts when such claims are not barred by the immunities provided by the Act. Federal courts are divided as to whether the Act requires them to apply the conflict-of-laws law of the state in which they sit or whether they may develop their own special conflict-of-laws rules to govern claims permitted by the Act.[480]

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[477] *Id.*

[478] *Id.*

[479] Federal courts have original but not exclusive jurisdiction over such cases, *id.* § 1330(a), and they are removable; *id.* § 1441(d).

[480] *Compare* Barkanic v. General Admin. of Civil Aviation, 923 F.2d 957, 959 (2d Cir. 1991) (statute requires application of forum state's choice-of-law rules) *with* Harris v. Polskie Linie Lotnicze, 641 F. Supp. 94, 96 (N.D. Cal. 1986) (adopting Restatement Second choice-of-law rules under federal common law and applying law of Poland in death action where death occurred in Poland), *aff'd*, 820 F.2d 1000 (9th Cir. 1987). *Accord* Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989). *Cf.* Pittston Co. v. Allianz Ins. Co., 795 F. Supp. 678, 682 (D.N.J. 1992) (marine insurance claim in admiralty governed by admiralty choice-of-law rules). *But cf.* Cimino v. Raymark Industries, Inc. 739 F. Supp. 328, 336 (E.D. Tex. 1990) (statute contains no implicit choice-of-law rule). *See generally* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 683-84 (3d ed. 1996).

B. Actions Against Other States

1. Federal court

Federal courts lack subject matter jurisdiction over actions brought by private persons against states of the United States.[481]

2. State court

Actions brought by private persons against states are not barred in other state courts under federal law.[482] A Mississippi state court is free to disregard a sister state's defenses of sovereign immunity, caps on damages, or other conditions that the law of the foreign state imposes on claims brought against it as a sovereign. Assets of a foreign state in Mississippi may be attached to satisfy judgments against the state.[483]

The Mississippi Supreme Court has held under its torts choice-of-law rules that Mississippi law applies to a claim for injuries inflicted in Mississippi on a Mississippi resident by the state of Alabama.[484] The Court proclaimed in dictum that when Mississippi substantive law applies under its choice-of-law rules, a foreign sovereign is not entitled to a defense of sovereign immunity because "[a] foreign governmental entity enjoys no greater status under our tort law than any other similarly situated tort defendant. We find no compelling public policy considerations which would indicate that [an Alabama state agency] should enjoy immunities above and beyond those provided to our citizens."[485]

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[481] U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced and prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."). This does not prevent certain orders enjoining state officials, *see generally* WRIGHT, *supra* note 235, § 48, at 306-12. Nor does it prevent counties and municipalities from being deemed "citizens" of their state for purposes of federal diversity of citizenship jurisdiction. Moor v. County of Alameda, 411 U.S. 693, 717-18 (1973), *overruled in part on other grounds by*, Monell v. Department of Social Servs., 436 U.S. 658 (1978); Reeves v. City of Jackson, 532 F.2d 491, 496 (5th Cir. 1976); Pyramid Corp. v. Desoto County Bd. of Supervisors, 366 F. Supp. 1299, 1301 (N.D. Miss. 1973).

[482] *See* Nevada v. Hall, 440 U.S. 410, 427 (1979) (affirming California state court judgment in tort action against state of Nevada). Justice Stevens considered and rejected challenges to California's jurisdiction based on sovereign immunity, full faith and credit, the Eleventh Amendment, and implied constitutional limits. *See generally* John Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 DUKE L.J. 449 (criticizing Justice Stevens's reasoning but approving of the holding).

[483] *See* Streubin v. Illinois, 421 N.W.2d 874, 876 (Iowa 1988) (permitting garnishment of tax revenues owed to Illinois by Illinois corporation in Iowa but only after requiring creditor first to attempt to satisfy judgment in Illinois on grounds of comity).

[484] *See* Church v. Massey, 697 So. 2d 407, 410 (Miss. 1997) (holding that trial

It is fair and reasonable to hold foreign states accountable for torts they commit in this state, regardless of whether they retain sovereign immunity in their own courts. The supreme court did not consider possible reasons to extend to other states the limits and conditions imposed on claims against Mississippi under the Mississippi Tort Claims Act.[486] The Act does not apply to foreign states by its terms, but an argument might be made for extending it to sister states on grounds of comity. First, the historical background discloses that foreign sovereigns traditionally enjoyed complete immunity in Mississippi state courts.[487] Second, foreign states are more like the state than like private citizens and principles of comparable treatment may favor according limited sovereign immunity to foreign states. Third, the legislative balance of the Mississippi Torts Claim Act between compensating private parties and limiting state liability may apply with equal force to claims

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court erred in dismissing Brewer State Junior College, agency of state of Alabama, pursuant to Alabama state Constitution when plaintiff was Mississippi resident and accident occurred in Mississippi).

[485] *Massey*, 697 So. 2d at 410.

[486] MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1997). *Cf. id.* § 11-46-13 (no trial by jury); *id.* § 11-46-15 (limits on damages and exclusion of punitive damages, prejudgment interest, and most attorneys fees). *See generally* David W. Case, *From* Pruett to Presley*: The Long and Winding Road to Abrogation of Common Law Sovereign Immunity in Mississippi*, 63 MISS. L.J. 537 (1994) (providing excellent discussion of history of limited waiver of sovereign immunity in Mississippi).

[487] While actions against foreign states may not have been constitutionally forbidden, they were in fact constitutionally unthinkable for most of the State's history, *cf.* MISS. CODE ANN. § 13-3-57 (Supp. 1997) (even the 1991 revision of the long-arm statute makes no provision for service on foreign states); *Hall*, 440 U.S. at 419. The Mississippi Supreme Court did not hold that such actions were permissible until 1997. *Massey*, 697 So. 2d at 410.

against foreign sovereigns. Fourth, the purposes behind Mississippi's limitation of its own sovereign immunity might be promoted by declining to treat foreign states as private citizens because foreign states that are denied the benefits of Mississippi's immunity in Mississippi courts might deny Mississippi comparable protection in their foreign courts.

There are still stronger reasons to apply the foreign state's own law of sovereign immunity in cases that arise outside Mississippi. For example, in a claim brought by an Alabama citizen against Alabama for injuries inflicted in Alabama, there seems to be no reason to disregard Alabama's sovereign immunity, but good reasons to recognize the defense.[488] A harder case would be presented where a Mississippi resident is injured out of state by a foreign sovereign. Although the Mississippi Supreme Court has suggested that the foreign immunity choice-of-law issue should be resolved like any other substantive tort issue, the legitimate claims of a sovereign to control the legal effects of its own acts in its own territory may outweigh the compensatory purposes of tort law that might otherwise suggest subjecting the foreign sovereign to liability under Mississippi law.

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[488] Recognizing the defense would not only promote comity but would deter forum shopping in cases in which Mississippi has no interest.

COMMENT

GAMBLING DEBTS: SHOULD POLICY CONSIDERATIONS AFFECT THEIR TREATMENT UNDER THE BANKRUPTCY CODE

I. INTRODUCTION

Federal bankruptcy law is premised on the notion that the "honest but unfortunate debtor"[1] should be given a fresh start in life with "a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[2] The Bankruptcy Code achieves this objective by permitting the discharge of the debtor's pre-petition debts while allowing the debtor to retain his post-petition earnings.[3] In furtherance of this "fresh start" policy, courts have held that the right of discharge cannot be waived.[4]

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[1] The "fresh start" policy of the Bankruptcy Code is limited to the "honest debtor." The United States Supreme Court has repeatedly emphasized that the Code "limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" Grogan v. Garner, 498 U.S. 279, 287 (1991).

[2] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[3] 11 U.S.C. § 727 (1988). *See* F. H. Buckley, *The American Fresh Start*, 4 S. CAL. INTERDIS. L.J. 67, 67 (1995) (arguing that fresh start policy is most prevalent under Chapter 7 of U.S. Bankruptcy Code).

[4] See *Hunt*, 292 U.S. at 245. The court, in determining that a pre-bankruptcy assignment of wages did not survive bankruptcy discharge, stated that "[f]rom the viewpoint of the wage earner, there is little difference between no earning at all

In addition to providing a "fresh start" to overburdened debtors, the American bankruptcy system is also designed to ensure the protection and payment of creditors.[5] As a result, the right of discharge is not absolute. For instance, section 523 of the Bankruptcy Code enumerates certain categories of debts, including child support, alimony, certain unpaid educational loans and taxes, and liabilities for fraud, which are excluded from the general policy of discharge.[6] Furthermore, general objections to discharge provisions are found in section 727(a).[7] Creditors' interests are further protected by provisions of the Bankruptcy Code which allow the bankruptcy trustee to avoid certain transfers by the debtor, such as preferential transfers[8] and fraudulent conveyances.[9] "In general, these sections may deny the debtor's general discharge or except a particular debt from discharge based on the debtor's past conduct."[10]

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and earning wholly for a creditor." *Id.* The court concluded that the "fresh start" which bankruptcy law afforded the emancipated debtor "would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy." *Id. See generally* Buckley, *supra* note 3, at 67-68 (arguing that debtors would be more credible if their Chapter 7 discharge rights could be waived).

[5] Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 50 (1986). Despite this second objective of the Bankruptcy Code, the vast majority of consumer bankruptcies ultimately result in little or no actual payments to creditors. *Id.*

[6] 11 U.S.C. § 523 (1988). "Although it is true that the bankruptcy laws were generally intended to give troubled debtors a chance, the nondischargeability exceptions reflect Congress' belief that debtors do not merit a fresh start to the extent that their debts fall within § 523." Langanella v. Braen (*In re* Braen), 900 F.2d 621, 623 (3d Cir. 1990).

[7] 11 U.S.C. §727(a) (1988).

[8] 11 U.S.C. § 547 (1988).

[9] 11 U.S.C. § 548 (1993). "Where a debtor has committed fraud under the code, he is not entitled to the benefit of a policy of liberal construction against creditors." Cohen v. De La Cruz (*In re* Cohen), 106 F.3d 52, 59 (3d Cir. 1997).

[10] David S. Kennedy & James E. Bailey, III, *Gambling and the Bankruptcy Discharge: An Historical Exegesis and Case Survey*, 11 BANKR. DEV. J. 49, 51 (1994-95). These exceptions to discharge evidence the policy that "an honest but unfortunate debtor obtains a fresh start while a dishonest debtor does not benefit from his wrongdoing." Citibank, N.A. v. Eashai (*In re* Eashai), 87 F.3d 1082, 1086 (9th Cir. 1996).

This concept, that a particular debt may be excepted from discharge based on the debtor's past conduct, is of great interest when considering the Bankruptcy Code's treatment of gambling debts. Should a hopelessly insolvent debtor who amasses thousands of dollars of credit card debt on a gambling spree just days before filing for bankruptcy be afforded a completely "fresh start?" Is this what the Supreme Court contemplated when it spoke of the "honest but unfortunate debtor?"[11] Gambling losses should also be evaluated in the context of the second purpose of the bankruptcy system: to preserve bankruptcy estates for fair distribution to all creditors.[12] It is contrary to the bankruptcy objective of fair treatment of creditors for an insolvent debtor to engage in excessive spending, such as throwing away thousands of dollars at a casino.[13] It would seem appropriate to empower the bankruptcy trustee to avoid such a transfer by the debtor, thus bringing the transferred assets back into the bankruptcy estate for payment to the debtor's creditors.

These bankruptcy issues have taken on greater significance with the explosion of legalized gambling in the United States over the past decade.[14] During that time frame, casino gambling has spread from Nevada and Atlantic City to twenty-five other states.[15] "Forty-eight states have one or more forms of legalized gambling," including thirty-six states and the District of Columbia which have government-operated lotteries.[16] Moreover, there are roughly "225 casinos and highstakes bingo halls on Indian reservations."[17] "It has been estimated that, by the year 2000, nearly ninety-five percent of all Americans will live within a three to four-hour drive of a casino."[18] Unfortunately, the $40 billion a year gambling industry is accompanied by an immeasurable social cost, including lost homes, squandered savings, and bankruptcies.[19] The significant jump in gambling related bankruptcies will likely mean that the dischargeability and avoidability of certain gambling debts will become more frequently litigated issues.

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[11] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244-45 (1934).

[12] *See supra* note 5 and accompanying text.

[13] *See* Robert J. Bein, *Robbing Peter to Pay Paul: Charitable Donations as Fraudulent Transfers*, 100 DICK. L. REV. 103, 117-18 (1995) (examining debtor's losses at casino as fraudulent transfers under § 548 of Bankruptcy Code).

[14] *See generally* Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 13-48 (1992) (addressing history of gambling and gambling regulation).

[15] Daniel LeDuc, *Gambling Addicts Ban Selves From Casinos*, STAR-LEDGER (Newark, N.J.), Feb. 25, 1996, at 306. The spread of legalized gambling is the result of efforts by state legislators to generate revenues without increasing taxes. *Id.*

[16] J. Scott Orr, *U.S. Study of Legalized Gambling Effects Near*, STAR-LEDGER (Newark, N.J.), May 15, 1996, at 010. In 1994, only Utah and Hawaii had no

Traditionally, most bankruptcy litigation involving gambling has pertained to the general objections to discharge provisions found in section 727(a)[20] and the exceptions to discharge provisions found in section 523(a).[21] This comment will focus on a provision of the Bankruptcy Code which appears to

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form of legalized gambling. James Popkin & Katia Hetter, *America's Gambling Craze*, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 43 [hereinafter Popkin & Hetter].

[17] Stephen A. Zorn, *The Federal Income Tax Treatment of Gambling: Fairness or Obsolete Moralism?*, 49 TAX LAW. 1, 1 (1995).

[18] *Id.* (citing Popkin & Hetter, *supra* note 16, at 42).

[19] LeDuc, *supra* note 15, at 306. "[M]any experts are concerned that lotteries are played most often by those who can least afford to play—low-income people hoping for a quick solution to their financial woes." Rychlak, *supra* note 14, at 12; *see also* Bruce Alpert, *House OKs Panel to Study Gambling: La. Delegation Favors Commission*, TIMES-PICAYUNE (New Orleans, La.) Mar. 6, 1996, at A3 (quoting Rep. Frank Wolf, R-Va., as saying "Congress can no longer turn a blind eye to the stories of poor mothers playing the slots with their children's lunch money"). As a result of the recent publicity that has been given to the hidden social costs of legalized gambling, voters in "seven of nine states rejected gambling proposals" which were on their ballots in 1996. *Casino Craze-New York Joins States Voting Thumbs Down*, TELEGRAM & GAZETTE (Worcester), Feb. 5, 1997, at A8.

[20] 11 U.S.C. § 727(a) (1988). Subsections (3) and (5) of § 727(a) are especially applicable to the discharge of gambling debts. Kennedy & Bailey, *supra* note 10, at 51; *see* 11 U.S.C. § 727(a)(3) (1988) (denying discharge when debtor destroys or falsifies recorded information); 11 U.S.C. § 727(a)(5) (1988) (denying discharge to debtor who fails to satisfactorily explain any loss of assets).

[21] 11 U.S.C. § 523(a) (1988). Subsections (2) and (6) are the most frequently litigated provisions of § 523(a). Kennedy & Bailey, *supra* note 10, at 51; *see* 11 U.S.C. § 523(a)(2) (1988) (excepting debts for money, property, or services obtained through fraud from debtor's general discharge); 11 U.S.C. § 523(a)(6) (1988) (excepting debts for willful or malicious injury to person or property of another from debtor's general discharge).

be a potential hot-bed for future litigation by examining the applicability of section 548(a)(2) to gambling debts. Section 548(a)(2),[22] which provides that constructively fraudulent transfers may be avoided by the bankruptcy trustee, has been grounds for few gambling related bankruptcy disputes to date. However, in light of the recent holding by the Sixth Circuit in *In re Chomakos*,[23] combined with an evolving interpretation of the "reasonably equivalent value" language of section 548(a)(2), this provision of the Bankruptcy Code will likely take on added significance. Finally, the so called "twin pillars" of bankruptcy, the "fresh start" for the debtor and the protection and payment of creditors, should warrant heightened consideration with regard to the Code's treatment of gambling debts.

II. ARE GAMBLING LOSSES BY INSOLVENT DEBTORS FRAUDULENT CONVEYANCES?

A. *Section 548 and Fraudulent Conveyance Law*

"The fraudulent conveyance, as known in our law, may be roughly defined as an infringement of the creditor's right to realize upon the available assets of his debtor."[24] As such, the general purpose of fraudulent conveyance law is to protect the debtor's estate for the benefit of its unsecured creditors.[25] Fraudulent conveyances are thus voidable by creditors or a bankruptcy trustee when the transfers unfairly prejudice the creditors' position.[26] Transfers made with an actual intent by the debtor to defraud creditors are obviously voidable.[27] However, fraudulent conveyance statutes also permit creditors to avoid transfers made by an insolvent debtor for less than adequate consideration.[28] By making constructively fraudulent transfers voidable, the problem of interpreting debtors' motivations has been eliminated.[29] "[T]he voiding of conveyances made by insolvents without consideration is based not upon a desire to punish the parties to the transaction for some wrongdoing, but upon the equitable principle that an insolvent must be just before she is generous."[30] The development of state fraudulent conveyance statutes and section 548 of the Bankruptcy Code is critical to an understanding of the applicability of fraudulent conveyance law to prepetition gambling losses.

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[22] 11 U.S.C. § 548(a)(2) (1993).

[23] Allard v. Flamingo Hilton (*In re* Chomakos), 170 B.R. 585 (Bankr. E.D. Mich. 1993), *aff'd,* 69 F.3d 769 (6th Cir. 1995), *cert. denied,* 116 S. Ct. 1568 (1996).

[24] GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES, § 1 (rev. ed. 1940).

[25] Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1413 (1994).

[26] Bein, *supra* note 13, at 105.

[27] *See* 11 U.S.C. § 548(a)(1) (1994); UNIF. FRAUDULENT TRANSFER ACT

1. *The Statute of Elizabeth*

Modern fraudulent conveyance laws are derived from England's Statute of Elizabeth,[31] which was passed in 1571. The Statute deemed void any conveyance made with intent "to delay, hinder or defraud creditors and others of their just and lawful actions, suits, [and] debts . . . ."[32] In 1601, the English

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§ 4(a)(1), 7A U.L.A. 652 (1985); UNIF. FRAUDULENT TRANSFER ACT § 7, 7 U.L.A. 509 (1985).

[28] *See* 11 U.S.C. § 548(a)(2); UNIF. FRAUDULENT TRANSFER ACT § 4, 7 U.L.A. 474 (1985); UNIF. FRAUDULENT TRANSFER ACT § 5; "The concern is that if a debtor, while insolvent, transfers away her property and receives nothing in return, her creditors may be left without adequate assets to pursue to satisfy their claims . . . ." Bein, *supra* note 13, at 105.

[29] Bein, *supra* note 13, at 109.

[30] Bein, *supra* note 13, at 109-10. This equitable maxim is widely cited by courts in the context of fraudulent conveyances. *E.g.,* Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504, 1508 (1st Cir. 1987); Rudy v. Austin, 19 S.W. 111, 113 (Ark. 1892); Durham v. Blackard, 438 S.E.2d 259, 263 (S.C. Ct. App. 1993).

[31] 13 Eliz., ch. 5 (Eng. 1571). Until the enactment of the Statute of Elizabeth, sixteenth century English law provided little deterrence of fraudulent conveyances. Bein, *supra* note 13, at 108. For instance, a debtor could freely transfer his assets to a related party and then seek sanctuary from the King's writ in certain protected areas. *Id.*

[32] 13 Eliz., ch. 5 (Eng. 1571). Although the Statute of Elizabeth operated to protect creditors, it was designed as a mechanism for raising revenue. Bein, *supra* note 13, at 108. It provided that one-half of the property fraudulently conveyed would be made available to the debtor's creditors, and the other half would be forfeited to the crown. *Id.* In fact, the statute did not even provide creditors with

Star Chamber interpreted the Statute of Elizabeth in *Twyne's Case*[33] and determined that certain transactions evidenced such "signs and marks of fraud" as to give rise to a presumption of fraudulent intent.[34] The development of these objective factors permitted the Twyne court to avoid having to determine the debtor's actual intentions.[35] This "badges of fraud" approach to determining fraudulent intent has been codified in the Uniform Fraudulent Transfer Act.[36]

2. *The Uniform Fraudulent Conveyance Act*

The Uniform Fraudulent Conveyance Act was promulgated in 1918 to modernize and unify the various state fraudulent conveyance statutes.[37] The U.F.C.A. contains provisions invalidating conveyances which are "actually" fraudulent[38] or "constructively" fraudulent.[39] By treating as fraudulent those conveyances made by insolvents for less than "fair consideration," the U.F.C.A. thereby places constructive fraud on the

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a direct remedy against a debtor's fraudulent conveyances. *Id.* However, an English court interpreted the statute as allowing a frustrated creditor to bring a direct action to avoid a transfer which was made with a fraudulent intent. Mannockes' Case, 3 Dyer 294b, 73 Eng. Rep. 661 (K.B. 1571).

[33] 76 Eng. Rep. 809 (Star Chamber 1601).

[34] *Twyne's Case*, 76 Eng. Rep. at 812. Such "signs and marks of fraud" included a gift being general, i.e., it transferred all of the debtor's assets; retention of the assets by the debtor after the transfer was made; the transfer being made in secret; and the transfer being made dependent on the creditor's actions. *Id.* at 80b-81a, 76 Eng. Rep. at 812-13.

[35] Bein, *supra* note 13, at 109.

[36] *See* UNIF. FRAUDULENT TRANSFER ACT § 4(b), 7A U.L.A. 653 (1985). The Statute of Elizabeth remains a component of the fraudulent conveyance common law or statutory law of every American jurisdiction. W. COLLIER, 4 COLLIER ON BANKRUPTCY § 548.02[3], at 548-31 (15th rev. ed. 1993).

[37] Prefatory note to UNIFORM FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 427-28 (1985). The U.F.C.A. is presently the law in only seven states: Delaware, Maryland, Massachusetts, Michigan, New York, Tennessee, and Wyoming. *Id.*

[38] UNIFORM FRAUDULENT CONVEYANCE ACT § 7, 7 U.L.A. 474 (1985). Such conveyances evidence an actual intent to defraud the creditors. *Id.*

[39] *Id.* § 4, 7 U.L.A. 474 (1985). Section 4 of the U.F.C.A. provides: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." *Id.*

same level as intentional fraud.[40] The Act defines "fair consideration" as a fair equivalent given in good faith.[41] Thus, even when a conveyance is contested on the ground that it is constructively fraudulent, a court must consider the good faith of the transferee.[42]

3. *The Uniform Fraudulent Transfer Act*

The Uniform Fraudulent Transfer Act, which was developed as a replacement for the U.F.C.A., was approved by the National Conference of Commissioners on Uniform State Laws in 1984.[43] The U.F.T.A.'s constructive fraud language is analogous to that of section 548 of the Bankruptcy Code in that both invalidate transfers made by insolvents without receiving a "reasonably equivalent value" in exchange.[44] It is clear from

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[40] Bein, *supra* note 13, at 110.

[41] UNIF. FRAUDULENT CONVEYANCE ACT § 3(a), 7A U.L.A. 448 (1985).

[42] Bein, *supra* note 13, at 110. "By including a good faith requirement, the U.F.C.A. directs its attention to the nature of the exchange attacked." *Id.*

[43] Michael L. Cook et al., *Fraudulent Transfers, in* BASICS OF BANKRUPTCY AND REORGANIZATION 1996, at 309 (PLI Com. Law & Practice Course Handbook Series No. 746, 1996). To date, 33 states have adopted the U.F.T.A.: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia, and Wisconsin. General notes to Unif. Fraudulent Transfer Act, 7A U.L.A. 716 (1985).

An important change made by the U.F.T.A. was the elimination of the "good faith" requirement contained in the U.F.C.A.'s definition of "fair consideration." Cook, *supra*, at 309. This modification, which was achieved by adopting the *reasonably equivalent value* standard, mirrored the approach already in use under the Bankruptcy Code. *See infra* notes 53-54 and accompanying text.

[44] *See infra* note 57 and accompanying text. There are two constructive fraud provisions within the U.F.T.A. Section 4(a), which pertains to "Transfers Fraudulent as to Present and Future Creditors," provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a *reasonably equivalent value* in ex-

the comments to the U.F.T.A. that the "value"[45] in question must be "determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. *Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition.*"[46] This insight is especially valuable considering that a primary objective of the U.F.T.A. was to harmonize state fraudulent conveyance law with the Bankruptcy Code.[47] In spite of the express purposes of these fraudulent conveyance statutes, judicial interpretations of the "reasonably equivalent value" language employed by the U.F.T.A. and section 548 of the Bankruptcy Code have deviated significantly from the meaning which the law's drafters originally intended.[48]

> change for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

UNIF. FRAUDULENT TRANSFER ACT § 4(a), 7A U.L.A. 652-53 (1985) (emphasis added). Section 5(a), which concerns "Transfers Fraudulent as to Present Creditors," provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a *reasonably equivalent value* in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Id. § 5(a), 7A U.L.A. 657 (1985) (emphasis added).

[45] The U.F.T.A.'s definition of value is:

> (a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

Id. § 3(a), 7A U.L.A. 650 (1985).

[46] *Id.* § 3 cmt. 2, 7A U.L.A. 651 (1985) (emphasis added).

[47] Prefatory note to UNIF. FRAUDULENT TRANSFER ACT, 7A U.L.A. 639-40 (1985).

[48] As noted above, the drafters intended for "reasonably equivalent value" to

4. *Section 548 of the Bankruptcy Code*

The fraudulent conveyance provision contained within the Bankruptcy Act of 1938[49] was modeled after its counterpart under the Uniform Fraudulent Conveyance Act.[50] The Bankruptcy Reform Act of 1978,[51] however, made several notable changes to federal bankruptcy law's approach to fraudulent conveyances by debtors. The most significant, and controversial, modification was the replacement of the phrase "fair consideration" with "reasonably equivalent value."[52] This change eliminated the "good faith" requirement contained in the U.F.C.A.'s definition of "fair consideration" and, in effect, shifted the focus of fraudulent conveyance law to the impact that the transaction has on creditors.[53]

Section 548 recognizes that a debtor may dispose of property in a manner which evidences either an *actual* intent or a *constructive* intent to place the assets beyond the reach of its creditors.[54] Section 548(a)(1) provides that a bankruptcy trustee may avoid a transfer made by the debtor with "actual intent to hinder, delay, or defraud" a creditor.[55] Under section

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be determined in light of the impact of the transfer upon the creditors. UNIF. FRAUDULENT TRANSFER ACT § 3 cmt. 2, 7A U.L.A. 651 (1985). However, as illustrated by numerous cases, some courts have abandoned the intended definition of "reasonably equivalent value" in favor of a more lenient and abstract interpretation. *See infra* notes 138-144 and accompanying text.

[49] (Chandler Act), ch. 575, 52 Stat. 840 (superseded by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C.)).

[50] Bein, *supra* note 13, at 110.

[51] Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C.).

[52] 11 U.S.C. § 548(a)(2)(A) (1993).

[53] Bein, *supra* note 13, at 111. Elimination of the U.F.C.A.'s good faith inquiry has completed the objectification of fraudulent conveyance law. *Id.*

[54] 11 U.S.C. § 548 (1993). "More precisely, it is fraudulent for a debtor to transfer its assets to a third party with intent—either actual or constructive—to obstruct creditors from proceeding against such assets to satisfy their claims." Cook, *supra* note 44, at 301; *see also* 11 U.S.C. § 548(a)(1) (1988) (enabling bankruptcy trustee to avoid transfers which are actually fraudulent, i.e., made "with actual intent to hinder, delay, or defraud"); 11 U.S.C. § 548(a)(2) (enabling trustee to avoid transfers which are constructively fraudulent, i.e., made at time when debtor is financially troubled or unsound).

[55] 11 U.S.C. § 548(a)(1) (1993). Section 548(a)(1) reads as follows:

> (a) The trustee may avoid any transfer of an interest of the debtor in

548(a)(2), the Code's constructive fraud provision, a trustee may set aside as constructively fraudulent a transfer by an insolvent if the transferor received less than a reasonably equivalent value in exchange for the transfer.[56]

> property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily —
>
> (1) made such transfer or incurred such obligation with *actual intent to hinder, delay, or defraud* any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . .

Id. (emphasis added).

A classic example of a § 548(a)(1) fraudulent conveyance in a gambling debts context is *Walsh v. Rose*, where the bankruptcy trustee sought to avoid as fraudulent transfers the Debtor's prepetition payments to his son-in-law. Walsh v. Rose (*In re* Hendrickson), No. 93-2138, 1993 WL 244935, at *1 (Bankr. W.D. Pa. 1993). Two days before filing for bankruptcy, the Debtor transferred $2,423 to his son-in-law (Rose) for the stated purpose of purchasing various goods. *Walsh*, 1993 WL 244935, at *1. However, in reality, Rose would negotiate the checks and then return the cash to the Debtor, who then used the funds to satisfy various gambling debts, none of which were listed on his Schedule of Assets and Liabilities. *Id.* The court noted that the checks sent to Rose contained false notations of their purposes and were intended by the debtor to mislead anyone who investigated the transfers. *Id.* at *3. The entire scheme was designed to enable debtor to repay his gambling creditors while concealing that fact from his other creditors. *Id.* Thus, the court held that the prepetition transfers were fraudulent under § 548(a)(1) because they were intended to hinder, delay and defraud the debtor's creditors and the bankruptcy estate. *Id.*; *see also* Dwyer v. Jones (*In re* Tri-State Paving), 32 B.R. 2, 4 (Bankr. W.D. Pa. 1982) (holding that withdrawal by individual debtors who were sole officers, stockholders, and directors of corporate-debtor of all funds in corporation's bank account to finance gambling trip to Las Vegas constituted fraudulent transfer under § 548(a)(1)).

These cases are illustrative of debtors who have an *actual* intent to defraud their creditors. The remainder of Part II of this Article will focus on transfers which are *constructively* fraudulent.

[56] 11 U.S.C. § 548(a)(2) (1993). The constructive fraud provision reads:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or *within one year* before the date of the filing of the petition, if the debtor voluntarily or involuntarily —
>
> (2)(A) received less than a *reasonably equivalent value* in exchange for such transfer or obligation; and
>
> (B)(i) was *insolvent* on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to en-

In addition to the avoidance powers granted to a bankruptcy trustee under section 548, section 544(b) of the Code also gives the trustee whatever avoiding powers an unsecured creditor with an allowable claim might have under applicable state or federal law, including the Uniform Fraudulent Conveyance Act or the Uniform Fraudulent Transfer Act.[57] While section 548 applies only to transfers that occurred within one year of the filing of the bankruptcy petition,[58] the U.F.T.A. provides for avoidance of transfers occurring within a four-year reach-back period.[59] Thus, despite several substantive differences in section 548 and state fraudulent conveyance laws, the primary consideration when deciding whether to proceed under section 548 or the "strong-arm" powers of section 544 is usually the timing of the transfer.[60]

> gage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a)(2) (1993) (emphasis added).

[57] *See* 11 U.S.C. § 544(b) (1993) (providing that "[t]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . ."). The powers granted to the bankruptcy trustee under § 544 are known as the trustee's "strong-arm" powers. The trustee can elect to bring an action under either or both sections.

[58] 11 U.S.C. § 548(a); *see supra* note 57. Section 546 imposes additional time constraints on the trustee's avoiding powers. Section 546(a) provides:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
> (1) the later of —
> (A) 2 years after the entry of the order for relief; or
> (B) 1 year after the appointment or election of the first trustee . . . ; or
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

[59] UNIF. FRAUDULENT TRANSFER ACT § 9(a) (1984).

[60] *See* Bein, *supra* note 13, at 113-14. A further consideration is that "the trustee, to use § 544(b), may need to find an actual, unsecured creditor who can set aside the fraudulent conveyance under state law." DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 371 (2d ed. 1990). Of course, locating such a creditor may not be worth the cost. *Id.* at 367.

5. *The Current Status of Section 548(a)*

There has been a distinct evolution in the policy underlying fraudulent conveyance law. Whereas the Statute of Elizabeth was a penal measure designed to punish wrongful behavior and raise revenues for the crown, today's fraudulent conveyance laws are more concerned with the impact of the transfer upon the creditors.[61] "The modern fraudulent conveyance statutes are concerned not so much with morality as with a maximization of assets available for creditors."[62]

Likewise, the primary goal of section 548 is to preserve the bankruptcy estate for fair distribution to all creditors by preventing transfers of estate property for less than "reasonably equivalent value" in exchange.[63] Unfortunately, the Bankruptcy Code does not define "reasonably equivalent value."[64] As a result, litigation involving fraudulent conveyances usually focuses on whether the debtor received "reasonably equivalent value" in exchange for the property transferred.[65] In contexts such as gambling losses, where intangibles are received in exchange for money that is wagered, this inquiry takes on added complexity.

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[61] Bein, *supra* note 13, at 112.

[62] *Id. See supra* text accompanying notes 25-27.

[63] David P. Schwartz, Note, BFP v. Resolution Trust Corporation: *Critiquing the Supreme Court's Method of Determining "Reasonably Equivalent Value" Within the Context of Bankruptcy Foreclosures*, 31 CAL. W. L. REV. 345, 352 (1995); *see* Grissom v. Johnson (*In re* Grissom), 955 F.2d 1440, 1446-47 (11th Cir. 1992) (stating that purpose of § 548 is to prevent depletion of bankruptcy estates); Bundles v. Baker (*In re* Bundles), 856 F.2d 815, 824 (7th Cir. 1988) (asserting that purpose is to "preserve the assets of the [bankruptcy] estate"); Henry-Luqueer Properties, Inc. v. Mayo (*In re* Henry-Luqueer Properties, Inc.), 145 B.R. 771, 775 (Bankr. E.D.N.Y. 1992) (noting that purpose is "fostering an equitable distribution of the debtor's property").

[64] The legislative history of section 548 provides little insight as to how "reasonably equivalent value" should be defined. Schwartz, *supra* note 64, at 355.

Section 548 defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A) (1994).

In general, "value" may be defined as "the amount of money which the property will command in exchange, if sold, this being called its 'market value' . . . ." BLACK'S LAW DICTIONARY 1551 (6th ed. 1990).

[65] Baird & Jackson, *supra* note 61, at 360.

B. Application of Section 548 in In re Chomakos

In *Allard v. Flamingo Hilton* (*In re* Chomakos),[66] the bankruptcy trustee sought to recover the debtor's prepetition gambling losses as fraudulent transfers under section 548 and under Michigan's Fraudulent Conveyance Act.[67] The debtors had lost $7,710 gambling at the Flamingo Hilton casino in Nevada during the year prior to filing for bankruptcy.[68] The court had to determine whether, at the time the bets were placed, the debtors received reasonably equivalent value in exchange for the money they wagered at the casino.[69] Applying the "totality of the circumstances" test, the Bankruptcy Court concluded that the debtors had received property of reasonably equivalent value in exchange for their bets, and therefore the transfers were not fraudulent.[70]

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[66] Allard v. Flamingo Hilton (*In re* Chomakos), 170 B.R. 585 (Bankr. E.D. Mich. 1993), *aff'd*, 69 F.3d 769 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1568 (1996).

[67] *In re* Chomakos, 170 B.R. at 588. Although the trustee did not specify whether he was relying on Bankruptcy Code § 548(a)(1) (the actual fraud provision) or § 548(a)(2)(A) (the constructive fraud provision), the court determined that the action must be brought under the constructive fraud provision in order to prevail. *Id.*

Likewise, the trustee failed to indicate the sections of the Michigan Uniform Fraudulent Conveyance Act under which he was proceeding. *Id.* Again, the court concluded that the trustee had to rely on the constructive fraud statute, MICH. COMP. LAWS ANN. § 566.14. This statute provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation incurred without a *fair consideration*.

MICH. COMP. LAWS ANN. § 566.14 (MICH. STAT. ANN. § 26.884).

The court stated that "[r]eceiving less than 'fair consideration' under the Michigan statute is properly considered to be essentially the same as receiving less than 'reasonably equivalent value' under § 548." *In re* Chomakos, 170 B.R. at 590. Thus, for purposes of this Article, the debtors' transfers will only be scrutinized in the context of § 548 of the Bankruptcy Code.

[68] *In re* Chomakos, 170 B.R. at 590. Nikki and George Chomakos filed a voluntary petition under Chapter 11 on August 2, 1990, and, after the matter was converted into a Chapter 7 case, an Order for Relief was entered on September 6, 1990. *Id.* at 587.

The bankruptcy court determined that at various times during June and September of 1989, Nikki Chomakos won a total of $9,000 playing slot machines at the Flamingo casino, while losing a total of $14,000. *Id.* at 589. Thus, her net gambling losses were $5,000 during the period when she was insolvent. *Id.*

The court also ascertained that George Chomakos suffered net gambling losses of $2,710 during the same period. *Id.* at 590. In total, the net gambling loss for the two debtors during the period when they were insolvent was $7,710. *In re* Chomakos, 170 B.R. at 590.

1. *Argument of the Bankruptcy Trustee*

The trustee argued that the determination of whether the exchange was for "reasonably equivalent value" should be made in light of two tests: first, the adequacy of consideration should be viewed "primarily from the creditor's standpoint;"[71] and second, the value of the benefit received by the debtor must approximate the value of the property or obligation he has given up.[72]

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[69] *Id.*

[70] *Id.* at 596.

[71] *Id.* at 592 (citing *In re* Anderson Indus., Inc., 55 B.R. 922, 927 (Bankr. W.D. Mich. 1985); *In re* Dondi Fin. Corp., 119 B.R. 106 (Bankr. N.D. Tex. 1990); McCaslin v. Schouten, 292 N.W. 696, 699 (Mich. 1940)). The court argued that, even assuming that the transfers should be considered from the creditors' standpoint, a fair argument could still be made that the direct and indirect benefits received by the debtors could amount to adequate consideration which does not "startle the correct mind nor shock the moral sense." *In re* Chomakos, 170 B.R. at 592 (quoting *In re* Dondi Fin. Corp., 119 B.R. at 109).

In making this argument, the court noted that such "direct and indirect" benefits received by the debtors included inexpensive hotel rooms and food buffets, discounted tickets for entertainment, as well as the "opportunity" to gamble and win money. *In re* Chomakos, 170 B.R. at 594. The court also pointed out that the net losses were incurred over an extended period of time that included numerous trips to the casino. *Id.* at 592.

[72] *Id.* The second test suggested by the bankruptcy trustee, known as the "balance sheet" test, compares the value of the property received by the debtor to the value of the property given up. *Id.* (citing *In re* Rodriguez, 895 F.2d 725 (11th Cir. 1990); *In re* Butcher, 58 B.R. 128 (Bankr. E.D. Tenn. 1986)).

Interpreting § 67(d), the predecessor to § 548(a), the Second Circuit stated that "the court must keep the equitable purposes of the statute firmly in mind, recognizing that any significant disparity between the value received and the obligation assumed by either [debtor] will have significantly harmed the innocent creditors of that firm." Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 994 (2d Cir. 1981).

The court rejected the trustee's first test, noting that "various creditors may have different ideas about what constitutes adequate consideration."[73] The court further recognized that consideration can exist even if the debtors spend money in a manner which does not benefit the creditors, such as treating themselves to lavish meals or expensive vacations.[74]

The second test advocated by the trustee was also met with the disapproval of the bankruptcy court.[75] The court pointed out that courts had applied the so-called "balance sheet" test almost exclusively in cases where the debtor received tangible benefits in exchange for the property transferred.[76] "However, in cases where intangible benefits are gained, such as the potential to earn more money than expended, the balance sheet test has not been used."[77]

2. *Argument of the Casino*

As its primary argument, the Flamingo Hilton asserted that in exchange for the money wagered, the debtors had received abundant benefits which constituted "reasonably equivalent value."[78] In essence, the casino claimed that the Chomakos' received "reasonably equivalent value" in the form of emotional satisfaction derived from placing a bet. Additionally, the casino contended that the debtors acquired entertainment options which they would not have otherwise had if they had not taken a gambling vacation to Las Vegas. The casino noted that the debtors received inexpensive hotel rooms, discounted tickets to Broadway quality shows, inexpensive food buffets, sightseeing tours and, of course, the opportunity to gamble and make money doing so.[79] In response, the court maintained that both gamblers and non-gamblers could receive the benefits listed by the casino as comprising "reasonably equivalent value," and the debtors thus did not receive anything in Las Vegas that they would not have received had they not gambled.[80]

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[73] *In re* Chomakos, 170 B.R. at 592. As an example, the court mentioned low priority unsecured creditors who would receive very little from the bankruptcy estate unless the debtor were to make risky investments to earn money. *Id.* Creditors with a higher priority would obviously be opposed to such high-risk investments. *Id.*

[74] *Id.*

[75] *Id.* at 592-93.

[76] *Id.* at 593.

[77] *Id.* The potential to make money on their bets, clearly an intangible benefit, constituted a significant portion of the "reasonably equivalent value" that the casino claimed the Chomakos received in exchange for the monies they wagered. *Id.* at 594.

[78] *In re* Chomakos, 170 B.R. at 594.

3. Approach Adopted by the Bankruptcy Court

Following the recent trend among many of the circuit courts, the Bankruptcy Court adopted the "totality of the circumstances" approach.[81] The court discussed numerous factors to be considered when applying this test, including: (1) whether the transactions were conducted at arms-length; (2) whether property or value was transferred to the debtor; (3) whether the debtor received additional valuable benefits as a result of the transaction; and (4) whether the transferee acted in good faith.[82]

In embracing this approach, the court acknowledged that most section 548(a)(2) cases have traditionally focused on "economic benefit" as the key ingredient of "value," but added that "the requirement of economic benefit to the debtor does not demand consideration that replaces the transferred property with money or something else tangible or leviable that can be sold to satisfy the debtor's creditor's claims."[83]

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[79] *Id.*

[80] *Id.*

[81] *Id.* at 593. The court noted that the "totality of the circumstances" approach considers all of the facts of a case to determine if reasonably equivalent value was received in exchange for the transfer. *Id.* at 592; *see* Cooper v. Ashley Communications, Inc. (*In re* Morris Communications NC, Inc.), 914 F.2d 458, 467 (4th Cir. 1990) (listing additional factors to consider, including differences in amount paid compared to fair market value, and percentage that amount paid is of fair market value); *In re* McConnell, 934 F.2d 662, 668 (5th Cir. 1991) (explaining that court does not state rule of law but considers all of facts surrounding transfer).

[82] *In re* Chomakos, 170 B.R. at 593-94.

[83] *Id.* at 590 (quoting 2 DAVID G. EPSTEIN ET AL., BANKRUPTCY, § 6-49, at 23

Applying the "totality of the circumstances" test, the court first determined that the gaming transactions which occurred between the debtors and the casino were conducted at arms-length.[84] The court then decided that value was transferred to the debtors in exchange for their bets.[85] The court likened gambling to an investment, which no one would question has economic value.[86] It also noted that the court in *In re Morris Communications NC, Inc.*[87] held that risky investments can have economic value, but it is up to courts to quantify the extent of that value.[88] Here, the court stated, the debtors received an opportunity to win more money than they wagered, as well as other intangible benefits such as emotional satisfaction.[89]

Next, the court held that the debtors had received additional valuable benefits as a result of the gambling transactions.[90] The court stated the additional benefits consisted of the "entertainment value" that the debtors derived from gambling at the Flamingo casino.[91] Finally, the court concluded that the Flamingo casino was acting in "good faith" in this

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(1992)).

[84] *In re* Chomakos, 170 B.R. at 593. In response to an assertion of the bankruptcy trustee, the court noted that an "arms length" transaction does not require equality of bargaining power between the parties. *Id.* Instead, "it involves (a) actions of essentially unrelated willing parties, each being relatively free to act in what each perceives to be his or her own self-interest, (b) actions which are voluntary (as opposed to being under compulsion or duress), and (c) actions which generally take place in an open market." *Id.*

[85] *Id.* at 593-94.

[86] *Id.* at 593. The court admitted that gambling would be considered by many as an unacceptably risky investment. *Id.*

[87] Cooper v. Ashley Communications, Inc. (*In re* Morris Communications NC, Inc.), 914 F.2d 458 (4th Cir. 1990).

[88] *In re* Chomakos, 170 B.R. at 594.

[89] *Id.* at 593.

[90] *Id.* at 594.

[91] *Id.* The "entertainment value" the debtors received included inexpensive hotel rooms and meals, Broadway quality shows, and extensive shopping and recreational opportunities. *Id.*

By holding that the debtors had received additional valuable benefits as a result of the transaction, the court rejected the "balance sheet" and "creditors' standpoint" tests that the bankruptcy trustee had proposed. *Id.*

situation.[92] The court explained that although "good faith" is not an express requisite of a section 548 analysis, the *Morris* court recognized that "good faith" is a factor that should be considered in applying the "totality of the circumstances" test.[93]

Of great importance is the fact that the bankruptcy court emphasized that its opinion was limited to the particular facts of the case.[94] In fact, the court conceded that:

> [o]ne could readily conjure up a situation where a "high roller," whose financial situation is well known, gambles at a casino one or two times shortly before filing bankruptcy and loses an inordinately large amount of money. That factual situation, or something much more akin to it than this one, contains the seeds of a possibly different result.[95]

The court professed that although it had concluded that the transfers in this case did not constitute fraudulent conveyances, it did "not thereby intend to insulate as a matter of law all legal gambling transactions from the reach of creditors."[96]

4. *Affirmance by the Sixth Circuit*

On appeal, the Sixth Circuit affirmed the Bankruptcy Court's decision that the debtors' bets were not voidable under section 548 of the Bankruptcy Code or under the Uniform Fraudulent Conveyance Act.[97] The Court of Appeals determined that for purposes of a fraudulent transfer claim, "[t]he point in time as of which [it] must determine whether [the debtors] received property of reasonably equivalent value in exchange for the money they wagered at the casino is the point at which their bets were placed."[98] Since gambling was legally conducted at the Flamingo casino,[99] the actual betting created legally enforceable contract rights, and these contract rights constituted "property" with economic value.[100] In fact, the court compared the debtors' bets to futures contracts purchased on margin.[101] Although the debtors' "investment" had the potential to turn out badly, the contractual right to receive payment in the event that the bet turned out well clearly had economic value, and the chance of winning was reasonably equivalent to the amount of money wagered.[102]

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[92] *Id.* at 595. The court stated that the casino was acting in its customary way consistent with the business in which it engaged. *Id.*

[93] *In re Chomakos,* 170 B.R. at 594.

[94] *Id.* at 596. The court stressed that in this particular case, the debtors had incurred their net losses over an extended period of time, and, in fact, had substantial winnings from gambling on two separate occasions. *Id.*

[95] *Id.*

[96] *Id.* Apparently, the court envisioned circumstances under which prepetition gambling losses of a debtor would be avoidable as fraudulent transfers. *Id.*

[97] Allard v. Flamingo Hilton (*In re* Chomakos), 69 F.3d 769, 769 (6th Cir. 1995), *aff'g* 170 B.R. 585 (Bankr. E.D. Mich. 1993), *cert. denied,* 116 S. Ct. 1568 (1996).

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[98] *In re Chomakos*, 69 F.3d at 770. Here, the court cited a Fourth Circuit decision, *In re* Morris Communications NC, Inc., as support for defining the critical time. *Id.* "The critical time is when the transfer is 'made.' Neither subsequent depreciation in nor appreciation in value of the consideration affects the value question whether reasonably equivalent value was given." *In re* Morris Communications NC, Inc., 914 F.2d 458, 466 (4th Cir. 1990) (quoting COLLIER ON BANKRUPTCY, § 548.09 at 116 (15th ed. 1984)).

[99] *In re* Chomakos, 69 F.3d at 771. The Flamingo Hilton casino is located in Las Vegas, Nevada, a jurisdiction in which casino gambling is legal. The court stated that "[w]here gambling is *lawful*, . . . the placing of a bet gives rise to legally enforceable contract rights." *Id.* (emphasis added).

However, in jurisdictions where gambling is unlawful, no legally enforceable contract rights are created upon the placing of a bet. Tokar v. Redman, 291 P.2d 987, 990 (Cal. Dist. Ct. App. 1956). In *Tokar*, the California court held that the payment of money in satisfaction of a gambling debt is a conveyance within the state's fraudulent conveyance statute, and thus could be avoided by the debtor's creditors. *Tokar*, 291 P.2d at 990. Since the playing of gambling games for money is illegal, "the consideration for the payment of a gambling loss incurred in playing them, that is, the opportunity to win more than the amount wagered, is likewise illegal, and does not constitute a fair consideration for the monies paid." *Id.* Therefore, the court held that "if a debtor, then being insolvent, gambles away his assets, or, being solvent, gambles away his assets and thus becomes insolvent, he has made a conveyance without *fair consideration* and his creditors may recover from the person who has received his money." *Id.* (emphasis added).

[100] *In re* Chomakos, 69 F.3d at 771. "The time that counts is not the time when the bet is won or lost, but the time when the bet is *placed*." *Id.* (emphasis added). Thus, at that "critical" point in time when the bet is placed—a time before anyone can know whether the bet will be successful—the property has economic value. *Id.*

[101] *Id.* at 771.

[102] *Id.* at 769.

The bankruptcy trustee relied upon *In re Young*,[103] where church contributions made by an insolvent donor were held to be avoidable as fraudulent conveyances.[104] In *Young*, the debtor donated money to his church in exchange for the satisfaction of his moral obligation to tithe and for the use of the services offered by the church.[105] The *Young* court held that an exchange of intangibles for money was not a transfer of "reasonably equivalent value."[106] In *Chomakos*, the trustee argued that it would be anomalous for gambling losses not to receive similar treatment and thus be deemed fraudulent conveyances.[107] The court disagreed, recognizing first that the cases addressing church contributions are in conflict.[108] Furthermore, the court noted that although a debtor contributing to a church may receive spiritual rewards, such returns are not likely to be of great benefit to the debtor's creditors.[109] On the other hand, a debtor who places a bet at a casino may receive hard cash in return,[110] and such return would obviously benefit the debtor's creditors.[111]

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[103] Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886 (Bankr. D. Minn. 1992), *aff'd*, 152 B.R. 939 (D. Minn. 1993).

[104] *In re* Young, 148 B.R. at 897.

[105] *In re* Young, 152 B.R. at 946, 948.

[106] *Id.* at 948-49. The court noted that "[a] debtor cannot receive reasonably equivalent value for payments that are made out of a sense of moral obligation rather than legal obligation." *Id.* at 948 (citing Whitlock v. Hause (*In re* Hause), 13 B.R. 75, 79 (Bankr. D. Mass. 1981)). Furthermore, the court stated that "emotional support received in exchange for a transfer, without more, cannot satisfy the requirement for reasonably equivalent value." *Id.* at 949 (citing Walker v. Treadwell (*In re* Treadwell), 699 F.2d 1050, 1051 (11th Cir. 1983)).

[107] *In re* Chomakos, 69 F.3d at 772.

[108] *Id.* In *In re Moses*, the court held that the debtors' contributions to their church were not fraudulent conveyances because the services provided to the debtors by the church constituted "property," and such property was "reasonably equivalent value" in exchange for the transfer of roughly $4,700 from the debtors to the church as tithes. Ellenberg v. Chapel Hill Harvester Church (*In re* Moses), 59 B.R. 815, 818 (Bankr. N.D. Ga. 1986). The *Moses* court pointed out that in exchange for their tithes and offerings, the debtors received nearly 100 hours of counseling, as well as heating, air conditioning, and electrical services for their comfort while they attended services. *In re Moses*, 59 B.R. at 818.

Similarly, the bankruptcy court in *In re Missionary Baptist Foundation of America* held that the "goodwill" the debtor received in return for its contributions to a religious outreach organization satisfied the "reasonably equivalent value" requirement, and the contributions could therefore not be avoided as fraudulent transfers. Wilson v. Upreach Ministries (*In re* Missionary Baptist Found. of Am., Inc.), 24 B.R. 973, 979 (Bankr. N.D. Tex. 1982).

[109] *In re* Chomakos, 69 F.3d at 772.

In concluding that the debtors received "reasonably equivalent value" in exchange for the monies they wagered, the Sixth Circuit relied on *In re Morris Communications NC, Inc.*[112] There, the issue concerned the valuation of the debtor's interest in a corporation that had one asset—a pending application before the Federal Communications Commission for a cellular telephone license.[113] Like the bets of the debtors in *In re* Chomakos, the corporation had a chance of winning, that is, being awarded the license, but it also had a chance of losing.[114] If the license was won by the corporation, then its stock would have substantial value; if the license was lost, then the corporation's stock would be worthless. Before the license was awarded, the debtor sold his stock in the corporation for $5,000.[115] The bankruptcy trustee sought to have the transaction set aside as a fraudulent conveyance under section 548(a)(2), arguing that the debtor did not receive "reasonably equivalent value" since the fair market value of the debtor's 26% stock interest in the corporation was approximately $50,000.[116] However, the Fourth Circuit Court of Appeals adopted the "totality of the circumstances" test and reversed the bankruptcy judge's avoidance of the transfer.[117] The Fourth Circuit noted that considering all of the facts of the case, including the various experts' estimations of the stock's value and the fact that the sale was an arm's length transaction between a willing buyer and willing seller, the bankruptcy judge was clearly erroneous in finding that the debtor did not receive reasonably equivalent value in exchange for the stock.[118]

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[110] *Id.* For example, Mrs. Chomakos won $5,000 one day while playing Flamingo's slot machines. *Id.*

[111] *Id.* If the debtor were to walk out of the casino with net winnings, then the value of the bankruptcy estate to be distributed among the creditors would obviously be enhanced. *Id.*

[112] Cooper v. Ashley Communications, Inc. (*In re* Morris Communications NC, Inc.), 914 F.2d 458 (4th Cir. 1990).

[113] *In re Morris Communications NC, Inc.*, 914 F.2d at 460. The licenses were to be awarded at a future date under a "lottery" procedure. *Id.* at 461.

[114] *Id.* at 469.

[115] *Id.* at 463-64.

[116] *Id.* at 467-68. The bankruptcy judge determined that the fair market value of the corporation's cellular application was roughly $192,000, thus making the debtor's twenty-six percent (26%) interest worth $50,000. *Id.* Based on that calculation of the value of the debtor's interest in the stock, the bankruptcy judge held that the transfer of the debtor's stock for $5,000 did not satisfy the requirement of "fair equivalent value" and held the transaction void. *See In re* Morris Communications NC, Inc., 75 B.R. 619, 629 (Bankr. W.D.N.C. 1987), *rev'd*, 914 F.2d 458 (4th Cir. 1990).

The *Chomakos* court analogized the debtors' bets to a risky investment in stock, and concluded that the "totality of the circumstances" approach employed by the Fourth Circuit in *Morris Communications* was appropriate for determining whether the Chomakos' received "reasonably equivalent value" for their bets.

C. What Interpretation of "Reasonably Equivalent Value" Is Appropriate in a Gambling Context?

"Despite the consensus on, and the frequent reference to, the purpose of section 548(a)(2), courts have strongly disagreed on what the statutory language of "reasonably equivalent value" ought to mean to serve the statutory purpose."[119] Moreover, what little harmony exists in courts' interpretations of the "reasonably equivalent value" language is limited to the context of real estate foreclosure sales. Thus arises the question of whether the approach to determining "reasonably equivalent value" in the realm of real estate foreclosure sales should be applied to gambling losses, or whether the gambling domain demands a standard tailored to the complexities of the industry.

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[117] *In re* Morris Communications NC, Inc., 914 F.2d at 467, 475 (4th Cir. 1990).

[118] *Id.* at 474-75.

[119] Schwartz, *supra* note 64, at 357.

1. *Defining "Reasonably Equivalent Value" Within the Context of Bankruptcy Foreclosures*

Traditionally, there have been three predominant approaches to determining "reasonably equivalent value" in the context of foreclosure sales. However, the United States Supreme Court recently rendered its opinion on the matter, thereby theoretically establishing a unified standard for application to foreclosure sales.[120]

Although employing different standards, virtually all courts have conceded that reasonable equivalence is not entirely synonymous with market value.[121] Of course, market value is an extremely important factor to be used in a court's determination of "reasonably equivalent value."[122] For instance, in *Durrett v. Washington National Insurance Co.*,[123] the Fifth Circuit applied a mathematical formula as a benchmark for determining "reasonably equivalent value."[124] Under this standard, any transfer of property for less than 70% of the property's fair market value is per se a voidable fraudulent transfer under section 548.[125] The *Chomakos* court, noting that this rigid test has been rejected by most courts, asserted that the 70% test is not mechanically controlling in any type of case, but is instead a factor to be considered in determining whether the debtor got a fair economic exchange.[126]

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[120] BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994).

[121] Bundles v. Baker (*In re* Bundles), 856 F.2d 815, 824 (7th Cir. 1988). "If anything is clear from the various uses of the word "value" in the Code, it is that Congress did not mean fair market value when it used the term reasonably equivalent value." *In re Bundles*, 856 F.2d at 824.

[122] *Id.*

> [V]aluation is left to be determined in each case, with an eye towards the purposes of Section 548 . . . . Ordinarily, however, the price which the property would actually bring if presently offered for sale by the owners, with a reasonable time for negotiation, should be a helpful starting point in determining value for purposes of Section 548(a)(2).

Gillman v. Preston Family Inv. Co. (*In re* Richardson), 23 B.R. 434, 442-43 n.12 (Bankr. D. Utah 1982).

[123] 621 F.2d 201 (5th Cir. 1980).

[124] *Durant*, 621 F.2d at 203. This approach measures the foreclosure sales price against a benchmark percentage of the fair market value of the foreclosed property as determined by an independent appraisal. *Id.*

[125] *Id.* at 204. The court noted that consideration less than 70% of the fair market value will rarely qualify as "reasonably equivalent value." *Id.* at 201.

The second major approach, which was developed by the Bankruptcy Appellate Panel of the Ninth Circuit in *Lawyers Title Insurance Co. v. Madrid*,[127] focused on compliance with state foreclosure procedures rather than the actual price obtained at the foreclosure sale.[128] The court held that "the consideration received at a non-collusive, regularly-conducted public sale satisfies the . . . reasonably equivalent value requirement" of section 548(a)(2).[129] The *Madrid* court concluded that even where the sale price is substantially below the property's fair market value, the foreclosure sale will stand absent collusion, fraud, unfairness, or violation of state foreclosure procedures.[130]

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[126] *In re* Chomakos, 170 B.R. at 591-92. The court stated that while reasonable equivalence may be lacking when more than 70% is paid, it may be present in situations where the debtor receives less than 70% of the transferred property's value. *Id.*

The court noted that if it were to apply the mathematical test, Nikki Chomakos may still have received reasonably equivalent value. *Id.* at 591. Over a two-day period of gambling, the debtor won amounts which exceeded 70% of the total amount that she expended. *Id.* at 592.

[127] 21 B.R. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied*, 469 U.S. 833 (1984).

[128] *In re* Madrid, 21 B.R. at 427.

[129] *Id.* at 425. In *In re Madrid*, the debtor's property was sold at a foreclosure sale for approximately 65% of its fair market value. *Id.* A week after the foreclosure sale, the debtor filed bankruptcy and sought to have the sale avoided as a fraudulent transfer under section 548. *Id.*

[130] *Id.* at 427. The court stated that inadequacy of price is insufficient grounds to set aside a foreclosure sale. *Id.* To avoid a foreclosure sale under section 548(a)(2), "there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." *Id.* (quoting Oller v. Sonoma County Land Title Co., 290 P.2d 880, 882 (Cal. Dist. Ct. App. 1955).

Since real estate foreclosure law has traditionally been controlled by the states, the narrow construction of section 548 by the *Madrid* court avoids a potential preemption controversy. *See* Schwartz, *supra* note 64, at 360. The federal definition of "reasonably equivalent value" under section 548, as applied to regularly conducted, noncollusive foreclosure sales, should be compatible with the applicable state substantive foreclosure law. Schwartz, *supra* note 64, at 360 n.105 (citing Bennett v. Genoa AG Ctr., Inc. (*In re* Bennett), 154 B.R. 140, 146 (Bankr. N.D.N.Y. 1992)).

The third approach entails an analysis of all the facts of each case, including the property's market value, to determine reasonable equivalence.[131] In *Bundles v. Baker*, the Seventh Circuit rejected the approaches of *Durrett* and *Madrid*, and instead adopted a middle of the road approach which considers the "totality of the circumstances."[132] The *Bundles* court noted that while the fair market value of the property transferred is an appropriate starting point for such review, the determination of whether "reasonably equivalent value" was received in exchange must consider the transaction as a whole.[133] The court concluded that in performing this analysis, there is a rebuttable presumption that the foreclosure price constitutes the property's "reasonably equivalent value."[134] In light of the *Bundles* decision, the "totality of the circumstances" test has become the most widely accepted approach to determining "reasonably equivalent value."[135]

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[131] Bundles v. Baker (*In re* Bundles), 856 F.2d 815, 823-24 (7th Cir. 1988).

[132] *In re* Bundles, 856 F.2d at 824. In applying the "totality of the circumstances" test, the *Bundles* court suggested numerous factors to be considered, including: (1) whether there was a fair appraisal of the property; (2) whether competitive bidding was encouraged; (3) whether the property was advertised widely; and (4) whether the sale was an arms-length transaction between a willing buyer and a willing seller. *Id. See supra* notes 83-95 and accompanying text (discussing bankruptcy court's application of "totality of circumstances" test in *In re* Chomakos).

[133] *In re* Bundles, 856 F.2d at 824. Determination of "reasonably equivalent value" should not be limited to a simple comparison of the foreclosure sale price to the market value, but should instead focus on the fair market value as affected by the foreclosure sale. *Id.* at 824-25.

[134] *Id.* at 825. The presumption can be rebutted by demonstrating that, considering the "totality of the circumstances," the foreclosure sale price did not reflect the property's "reasonably equivalent value." *Id.* at 824-25.

[135] Cooper v. Ashley Communications, Inc. (*In re* Morris Communications NC, Inc.), 914 F.2d 458, 467 (4th Cir. 1990) (adopting "the majority view [totality of circumstances approach] on the meaning of reasonable equivalence in [the foreclosure sale] context"). *See, e.g.,* Grissom v. Johnson (*In re* Grissom), 955 F.2d 1440 (11th Cir. 1992); Barrett v. Commonwealth Fed. Sav. & Loan Ass'n, 939 F.2d 20 (3d Cir. 1991).

Remember, of course, that the bankruptcy court in *Chomakos* also applied the "totality of the circumstances" test. *In re* Chomakos, 170 B.R. at 593; *supra* note 83 and accompanying text.

In *BFP v. Resolution Trust Corporation*,[136] the Supreme Court apparently resolved the conflict between the circuits by holding that "reasonably equivalent value" in the context of mortgage foreclosure sales is "the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with."[137] In endorsing the *Madrid* approach, the Supreme Court noted that while both *Durrett* and *Bundles* refer to fair market value as the benchmark for determining fair market value, such reference, in the context of an otherwise lawful mortgage foreclosure sale, is not consistent with the text of the Bankruptcy Code.[138]

As recognized by Justice Souter in his dissent, a central premise of bankruptcy law is that a property transfer may be set aside because of its impact on the assets available for fair distribution among the debtor's creditors.[139] Nevertheless, based on the majority's decision that the price received at a foreclosure sale conclusively establishes "reasonably equivalent value,"[140] it appears that a fair value is not required before property may be transferred.[141] However, it is important to note that the Court emphasized that its decision "covers only mortgage foreclosures of real estate."[142]

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[136] 114 S. Ct. 1757 (1994).

[137] *BFP*, 114 S. Ct. at 1765. The court was interpreting the "reasonably equivalent value" language of section 548(a)(2) of the Bankruptcy Code. *Id.*

[138] *Id.* at 1761. The court based its conclusion on the fact that the term "fair market value" does not appear in section 548 of the Bankruptcy Code. *Id.* Justice Scalia noted that, in contrast, section 522, which exempts certain property of the debtor from inclusion in the bankruptcy estate, "specifically provides that, for purposes of that section, 'value' means fair market value as of the date of the filing of the petition." *Id.* Although section 548 could have provided for the avoidance of transfers for less than *"fair market value,"* it instead used the *"reasonably equivalent value"* terminology. *Id.* (emphasis added).

[139] *Id.* at 1774-75 (Souter, J., dissenting). Justice Souter stated that:

> [t]he Court today holds that by the terms of the Bankruptcy Code Congress intended a peppercorn paid at a noncollusive and procedurally regular foreclosure sale to be treated as the "reasonable equivalent" of the value of a California beachfront estate. Because the Court's reasoning fails both to overcome the implausibility of that proposition and to justify engrafting a foreclosure-sale exception onto 11 U.S.C. § 548(a)(2)(A), in derogation of the straightforward language used by Congress, I respectfully dissent.

Id. at 1767 (Souter, J., dissenting).

[140] *Id.* at 1757.

2. *Determining "Reasonably Equivalent Value" in Other Contexts*

Although most common in the framework of mortgage foreclosure sales, the issue of whether "reasonably equivalent value" was received in exchange for a transfer of property by a debtor is frequently litigated in other contexts as well. As discussed throughout this comment, the purpose of section 548 of the Bankruptcy Code is to preserve the bankrupt debtor's estate for fair distribution among his creditors.[143] What has proven to be problematic is the extent to which courts will recognize this purpose when determining whether a particular transfer of the debtor's property should be avoided as a fraudulent conveyance.

It is fundamental that a transfer be economically beneficial to the debtor's estate for it to yield "value."[144] Thus, reasonable consideration for fraudulent conveyance purposes "means more than just the 'good and valuable' consideration needed to support a simple contract under state law."[145] "[I]f the benefit of the transaction to the debtor does not substantially offset its cost to him, then his creditors have suffered," and the transaction was not supported by reasonably equivalent value.[146] The determination of whether "reasonably equivalent value" was given will, therefore, focus on whether the debtor received either a direct or indirect "economic benefit."[147]

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[141] Schwartz, *supra* note 64, at 347.

[142] *BFP*, 114 S. Ct. at 1761 n.3.

[143] *See supra* notes 25-31 and accompanying text (describing general objective of fraudulent conveyance law); *supra* notes 62-64 and accompanying text (describing purpose of section 548).

[144] Rubin v. Manufacturers Hanover Trust, 661 F.2d 979, 991-92 (2d Cir. 1981); *see also* Ransier v. Public Employees Retirement Sys. (*In re* Cottrill), 118 B.R. 535, 537 (Bankr. S.D. Ohio 1990) (stating that under § 548(a)(2), it is necessary to show lack of economic benefit).

"Reasonably equivalent value" means substantive value that is reasonable in view of the surrounding circumstances and is not "so far short of the real value of the property as to startle a correct mind, or shock the moral sense." *In re* Dondi Fin. Corp., 119 B.R. 106, 109 (Bankr. N.D. Tex. 1990).

[145] *In re* 375 Park Ave. Assocs., Inc., 182 B.R. 690, 695 (Bankr. S.D.N.Y. 1995) (quoting Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991 (2d Cir. 1981)); *see also* Vadnais Lumber Supply, Inc. v. Byrne (*In re* Vadnais Lumber Supply, Inc.), 100 B.R. 127, 136 (Bankr. D. Mass. 1989) (asserting that unlike consideration, there must be some measurable economic benefit to constitute "rea-

The Third Circuit recently addressed the predicament faced by the *Chomakos* court: defining "reasonably equivalent value" in cases where the debtor exchanges cash for intangibles, such as services or the opportunity to obtain economic value in the future, the value of which is difficult, if not impossible, to ascertain.[148] In *Mellon Bank, N.A. v. Official Committee of Unsecured Creditors of R.M.L., Inc.*, the debtor paid $390,000 of lending fees to a bank in connection with a failed $53 million financing commitment.[149] The $53 million line of

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sonably equivalent value").

[146] *Rubin*, 661 F.2d at 991.

[147] *In re* 375 Park Ave. Assocs., Inc., 182 B.R. 690, 695-96 (Bankr. S.D.N.Y. 1995) (citing *Rubin*, 661 F.2d at 991, 993). In *375 Park Ave. Assoc.*, the debtor had signed a $3,000,000 Pledge Agreement to fund the construction of archives for the U.S. Holocaust Memorial Museum. *Id.* at 692. In return for the pledge, the museum's archives were to be named in the debtor's honor. *Id.* Applying the "economic benefits test," the court concluded that the debtor did not receive any benefits, whether tangible or intangible, of *monetary value* in return for his pledge of $3,000,000. *Id.* at 697 (emphasis added).

The bankruptcy court contrasted the value received by the debtor in exchange for signing the Pledge Agreement to the value received by the debtors in *In re Chomakos*. *Id.* at 696. The court noted that the *Chomakos* court determined that gambling bets were analogous to risky investments, which definitely have economic value. *In re* 375 Park Ave. Assocs., Inc., 182 B.R. at 696.

See generally HBE Leasing Corp. v. Frank, 48 F.3d 623, 638-39 (2d Cir. 1995) (stating that "to determine whether a debtor indirectly received [reasonably equivalent value] . . . , the fact finder must first attempt to measure the economic benefit that the debtor indirectly received from the entire transaction, and then compare that benefit to the value of the property the debtor transferred").

[148] Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (*In re* R.M.L., Inc.), 92 F.3d 139, 148 (3d Cir. 1996), *aff'g* 187 B.R. 455 (Bankr. M.D. Pa. 1995); *see also* Butler Aviation Int'l, Inc. v. Whyte (*In re* Fairchild Aircraft Corp.), 6 F.3d 1119, 1125-26 (5th Cir. 1993) (stating that "[a]lthough the minimum quantum necessary to constitute reasonably equivalent value is undecided, it is clear that the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value").

[149] *In re* R.M.L., Inc., 92 F.3d at 143-44.

credit was conditioned upon a $15 million equity investment in the debtor corporation by an outside investor.[150] In making its determination, the Third Circuit recognized that the mere opportunity to receive an economic benefit in the future constitutes "value" under section 548(a)(2).[151] In fact, the court noted that money spent on investments that fail to stabilize or improve the debtor's condition (i.e., "losing" investments) can confer "reasonably equivalent value."[152] The court concluded that because the debtor expended $390,000 in commitment fees for a loan that had little chance of closing, it did not receive "reasonably equivalent value."[153]

In *In re R.M.L., Inc.*, the Third Circuit relied upon its earlier decision in *Mellon Bank, N.A. v. Metro Communications, Inc.*,[154] where it held that the mere expectation that the merger of two companies would produce a strong synergy would suffice to confer reasonably equivalent value as long as the expectation was "legitimate and reasonable."[155] "Thus, so long as there is some chance that a contemplated investment will generate a positive return at the time of the disputed transfer, . . . [reasonably equivalent] value has been conferred."[156]

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[150] *Id.*

[151] *Id.* at 148. The bank had argued that the commitment letter conferred "value" to the extent that it provided the financially troubled company with the chance of obtaining financing that could save it from bankruptcy. *Id.* The court acknowledged that the ability to borrow money has considerable value in the commercial world. *Id.* at 154.

The Third Circuit approved of the Bankruptcy Court's reliance on the "totality of the circumstances" test in assessing the "value" of the commitment letter. *Id.* at 153.

[152] *Id.* at 152; *see* Allard v. Flamingo Hilton (*In re* Chomakos), 69 F.3d 769, 771 (6th Cir. 1995) (holding that gambling losses conferred value on debtor); Butler Aviation Int'l, Inc. v. Whyte (*In re* Fairchild Aircraft Corp.), 6 F.3d 1119, 1119 (5th Cir. 1993) (holding that money spent in failed attempt to keep commuter airline afloat conferred value on debtor).

[153] *In re* R.M.L., Inc., 92 F.3d at 154. The court found that because of the debtor's deteriorating financial condition, it was highly unlikely that it could secure an equity investor. *Id.* Since the chances of the loan closing were negligible, the debtor was essentially exchanging substantial fees for an extremely remote opportunity to receive value in the future. *Id.* at 148.

[154] 945 F.2d 635 (3d Cir. 1991).

[155] *Metro Communications, Inc.*, 945 F.2d at 647. In that case, the trustee sought to avoid an alleged fraudulent conveyance to a bank which had financed a leveraged buyout ("LBO") of a corporate debtor's stock and, in return, had received the debtor's guarantee of repayment and a security interest in the debtor's assets. *Id.* at 638. In determining whether the bank gave "reasonably equivalent

IV. CONCLUSION

In biblical terms, gambling may be a sin, but according to the *Chomakos* court, prepetition gambling losses cannot be avoided by a bankruptcy trustee as fraudulent conveyances.[157]

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value" in exchange for the guarantee and security interest, the court noted that the debtor corporation, as the target in an LBO, received no direct benefit in the transaction. *Id.* at 646. However, the court concluded that "[i]f the consideration [the debtor] received from the transaction, even though indirect, approximates the value it gave [the acquiring corporation], this can satisfy the terms" of section 548(a)(2)(A). *Id.* "The touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *Id.* at 647.

The bankruptcy judge in *In re R.M.L., Inc.* noted that the *Metro Communications* decision could be interpreted as rejecting the "totality of the circumstances" test in favor of an approach that views the transaction solely from the perspective of creditors. Official Comm. of Unsecured Creditors v. Mellon Bank, N.A. (*In re* R.M.L., Inc.), 187 B.R. 455, 466 (Bankr. M.D. Pa. 1995). The judge based his opinion on the following statement from *Metro Communications, Inc.*:

> [B]ecause the fraudulent conveyance laws are intended to protect the debtor's creditors, a lender cannot hide behind the position, although sympathetic, that it has parted with reasonable value. The purpose of the laws is estate preservation; thus, the question whether the debtor received reasonable value must be determined from the standpoint of the creditors.

Metro Communications, Inc., 945 F.2d at 646. However, based on other recent decisions issued by the Third Circuit, the bankruptcy judge concluded that *Metro Communications, Inc.* applied the "totality of the circumstances" inquiry, and merely emphasized the creditor's interests and the conferral of tangible economic benefits as important considerations in assessing "reasonably equivalent value." *In re* R.M.L., Inc., 187 B.R. at 466.

[156] *In re* R.M.L., Inc., 92 F.3d at 152; *accord In re* Chomakos, 69 F.3d at 771 (holding that because legalized gambling provides fair chance for significant payoff, debtors received "reasonably equivalent value" in exchange for their gambling losses of $7,710); *In re* Fairchild Aircraft Corp., 6 F.3d at 1126 (holding that $432,380 spent in failed attempt to keep commuter airline viable conferred value because "the likelihood that a sale would occur was also demonstrably high").

[157] *See* Martin I. Klein, *Sin or Not, Gambling Isn't a Fraudulent Conveyance*, 13 No. 5 BANKR. STRATEGIST, Mar. 1996, at 7, 7 (discussing Sixth Circuit's decision in *In re Chomakos* and respective arguments of bankruptcy trustee and casino).

However, as the court acknowledged, its holding was limited to the specific facts of the case.[158] It can readily be argued that policy considerations require a completely new approach to defining "reasonably equivalent value" in the context of gambling losses.

In applying the "totality of the circumstances" test, the *Chomakos* court relied on an economic benefits evaluation in holding that the debtors received "reasonably equivalent value" in exchange for their bets.[159] In reaching its decision, the bankruptcy court stressed that "the *quid pro quo* was established in the context of a state regulated business, existing in an open, competitive marketplace responding and responsive to desires of legitimate tourists pursuing and engaging in a legal and legitimate pursuit."[160] The court further asserted that the Chomakos' gambling losses were no different than money spent on expensive dinners or lavish vacations.[161] The court justified the harsh implications that its decision would have on the Chomakos' creditors by maintaining that the gambling transactions were "arms-length ordinary course of 'business' type . . . activit[ies] being engaged in by both [the debtors] and [the casino]."[162]

There are several flaws in this reasoning. First and foremost, the court fails to recognize that the gambling industry is not an "ordinary business activity." To the contrary, gaming is one of the most heavily regulated *legalized* businesses in existence. Furthermore, the social costs associated with gambling, not the least of which is the significant increase in bankruptcies, likely exceed those of any other legal endeavor.[163] Yet, the Sixth Circuit insists that money "spent" at a casino is no different than money spent at a fine restaurant.[164] However:

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[158] *See supra* notes 96-98 and accompanying text.

[159] *See supra* notes 99-104 and accompanying text.

[160] *In re* Chomakos, 170 B.R. 585, 592 (Bankr. E.D. Mich. 1993). The court noted that the tests for "reasonably equivalent value" focus on balancing prejudice to the debtor's creditors against society's interest in maintaining the integrity of commercial transactions. *In re Chomakos*, 170 B.R. at 591.

[161] *Id.* at 595. The Sixth Circuit concluded that if the Chomakos' had spent $7,710 on expensive dinners rather than on gambling, their creditors would have been no better off. *In re* Chomakos, 69 F.3d at 772.

[162] *In re* Chomakos, 170 B.R. at 595.

[163] *See supra* note 19 and accompanying text.

> If the casino industry is just another business, then why is it taxed differently from, say, General Motors or Home Depot? Why is it shaken down by every level of state and local government? Why does it pay annual fees, local option fees, and city and county fees on each gaming device along with monthly gross-revenue fees, state annual device fees, and even *background investigation costs*?[165]

Obviously, the gaming industry is not treated like an "ordinary commercial activity." Accordingly, gambling losses should receive disparate treatment under the Bankruptcy Code. Courts must abandon the "ordinary course of business" analysis in the context of gambling losses, and instead formulate an approach narrowly tailored to the gaming domain. Under this modified approach, most gambling losses, especially those in so-called "high roller" situations,[166] would be avoidable because the debtor would be determined to have not received "reasonably equivalent value" in exchange.

Another problem with the *Chomakos* court's reasoning is its assertion that economic value is inherent in the placing of a bet.[167] The court stated that in jurisdictions where gambling is lawful, the placing of a bet gives rise to a legally enforceable contract right.[168] The court thus concluded that such a contract right constitutes "property" with economic value.[169] However, this logic is questionable considering that the Statute of Anne has been incorporated into the law of every state.[170]

In 1710, Queen Anne signed the Statute of Anne in order to curtail gambling in England and to prevent large transfers of wealth resulting from gambling debts.[171] The effect of the Statute of Anne was to make any note or instrument given in payment of gambling debts of ten pounds or more absolutely void.[172] All states have adopted some version of the Statute of Anne, whether it be statutory or common law.[173] As a result, American courts have refused to aid in the collection of gambling debts.[174] In fact, "[t]here can be no claim made on any contract founded upon gaming."[175] As such, how can the placing of a bet give rise to a "legally enforceable contract right?" In light of the Statute of Anne and its adoption by all the states, the Sixth Circuit's contention that the placing of a bet creates contract rights which constitute "property" with economic value seems untenable at best.

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[164] *In re* Chomakos, 69 F.3d at 772.

[165] Ben C. Toledano, *The Carpetbaggers Are Back: Mississippi Gambles*, NAT'L REV., Apr. 7, 1997, at 30, 32 (emphasis added).

[166] *See supra* text accompanying note 97.

[167] *In re* Chomakos, 69 F.3d at 771.

[168] *Id.*

[169] *Id.*

[170] *See generally* Rychlak, *supra* note 14, at 19-20 (discussing Statute of Anne and its adoption by American jurisdictions).

Furthermore, the *Chomakos* court put an undue emphasis on the impact that avoidance of the transfers would have on the casino.[176] In doing so, the court failed to recognize the purpose of section 548, which is to preserve the bankrupt debtor's estate for distribution among his creditors.[177] The *Chomakos* decision should be contrasted with that of *1992 Republican Senate-House Dinner Committee v. Carolina's Pride*

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[171] Rychlak, *supra* note 14, at 19. The statute provided that "all Notes, Bills, Bonds, Judgments, Mortgages, or other Securities or Conveyances whatsoever" given in payment of gambling debts of 10 pounds or more were deemed "void, frustrate, of none Effect to all Intents and Purposes." *Id.* (quoting 9 Anne, ch. 14, § 1 (1710)).

[172] *Id.*

[173] *Id.* at 20.

[174] Corbin v. O'Keefe, 484 P.2d 565, 566 (Nev. 1971).

[175] Resorts Int'l Hotel, Inc. v. Agresta, 569 F. Supp. 24, 26 (E.D. Va. 1983). The court noted that the state's court system was unavailable to unpaid gambling winners. *Id.*; *see also* West Indies, Inc. v. First Nat'l Bank, 214 P.2d 144, 152 (Nev. 1950) (holding that Statute of Anne was part of Nevada law, and, thus, casino was not allowed to collect payment on checks written to casino by gambler who died before casino had cashed checks).

[176] Both the *Chomakos* and *BFP* decisions are premised on an aversion to placing the burden of debtor irresponsibility on the transferee. Bein, *supra* note 13, at 117, 119.

[177] The Sixth Circuit stated that it did not believe that the gambling transactions should be evaluated solely from the standpoint of the debtors' creditors. *In re* Chomakos, 69 F.3d at 772.

Seafood, Inc.[178] [hereinafter *GOP Dinner*], where the debtor contributed $500,000 to a political organization in order to obtain a seat at President Bush's table at a fund-raising dinner.[179] Disregarding the intangible benefits that the debtor may have received, such as excitement, opportunity, emotional satisfaction, and pleasure, the court held that the transfer was made without reasonable consideration, and therefore was fraudulent to the debtor's creditors.[180]

The only distinction between *Chomakos* and *GOP Dinner* is that the money expended at the casino was spent in a commercial exchange.[181] However, from the viewpoint of creditors, the two transactions look exactly the same.[182] By holding that the Chomakos received "reasonably equivalent value" in exchange for their bets, the *Chomakos* court completely disregarded the impact of the transaction on the debtor's creditors.

An approach more appropriate for determining "reasonably equivalent value" in a gambling context is a modified "totality of the circumstances" test. While the various factors already considered in the existing approach would remain intact, two factors would be weighed more heavily in making the determination. First, the transaction would be closely scrutinized to ascertain its impact on the debtor's unsecured creditors. This factor takes on added significance in the gambling context due to the unique policy considerations surrounding gambling debts and the gaming industry in general.[183] Second, courts should consider the period of time over which the gambling losses occurred. Cases where relatively moderate amounts of money were lost over the course of the year preceding the filing of the bankruptcy petition would be viewed much more favorably than situations where a "high roller" loses an inordinately large amount of money just days before filing bankruptcy.[184] Under this proposed approach and its emphasis on the above mentioned factors, gambling losses would be more vulnerable to avoidance as fraudulent conveyances.

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[178] 858 F. Supp. 243 (D.D.C. 1994).

[179] *GOP Dinner*, 858 F. Supp. at 245.

[180] *Id.* at 249. The court assumed that the debtor did not receive tangible benefits of reasonable equivalence to his $500,000 contribution. *Id.* In refusing to consider the intangible benefits that the debtor may have received, the court noted that from a creditor's perspective, charitable donations may cause the rapid depletion of the assets available for distribution. *Id.* "For this reason, courts have been reluctant to place a value on non-monetary consideration." *Id.*; *see* Zahra Spiritual Trust v. United States, 910 F.2d 240, 248-49 (5th Cir. 1990) (refusing to recognize "spiritual fulfillment" as appropriate consideration for purposes of determining whether transfer to charity violated fraudulent conveyance statute).

[181] Bein, *supra* note 13, at 124. "Under the reasoning of *Chomakos*, [the debtor's] donation [in *GOP Dinner*] might be regarded as an entertainment expense. After all, one would expect eating dinner with the President to cost more than gambling at the Flamingo." *Id.*

[182] *Id.* In neither case did the transfer of the debtor's property bring anything tangible back into the estate. *Id.* The court in *GOP Dinner* emphasized the impact that the transaction had upon the assets available for distribution to the debtor's creditors. *GOP Dinner*, 858 F. Supp. at 249.

Unless courts adopt an approach devised specifically for gambling losses, debtors' unsecured creditors will be dealt a losing hand. As suggested by Robert J. Bein, perhaps "[a] remedy that focuses on the debtor's wrongdoing, such as denial of discharge, may be better suited to [a *Chomakos*] situation, even though it may offer little solace to creditors whose claims remain unpaid."[185]

J. Chadwick Mask

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[183] *See supra* notes 165-167 and accompanying text; *supra* notes 172-177 and accompanying text.

[184] *See supra* text accompanying notes 97-98.

[185] Bein, *supra* note 13, at 118.

RECENT DECISION

WORKERS' COMPENSATION — STATUTORY IMMUNITY — GENERAL CONTRACTORS AND SUBCONTRACTORS IMMUNE FROM COMMON LAW SUITS BROUGHT BY INSURED SUB-SUBCONTRACTOR'S EMPLOYEES

Brasfield & Gorrie General Contractor, Inc. ("Brasfield") contractually required FabArc Steel Supply, Inc. ("FabArc"), the subcontractor, to provide workers' compensation coverage for FabArc employees.[1] FabArc in turn contractually required Model City Erection ("Model"), the sub-subcontractor, to procure workers' compensation insurance for Model employees.[2] David Crowe received workers' compensation benefits through Model and then filed a negligence suit against Brasfield and FabArc.[3] Brasfield and FabArc claimed workers' compensation afforded Crowe's exclusive remedy and moved for summary judgment.[4]

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[1] Crowe v. Brasfield & Gorrie Gen. Contractor, Inc., 688 So. 2d 752, 753 (Miss. 1996). Brasfield, the general contractor, subcontracted with FabArc to do the structural steel work on a construction venture. *Crowe*, 688 So. 2d at 753.

[2] *Crowe*, 688 So. 2d at 753. FabArc then contracted with Model to do portions of the steel work. *Id.*

[3] *Id.* While working for Model on the Brasfield construction project, Crowe sustained serious injuries and became permanently disabled when he fell nineteen feet. *Id.*

The United States District Court for the Southern District of Mississippi granted the defendants' motions.[5] The Mississippi Supreme Court, responding to a certified question from Fifth Circuit Court of Appeals, held: Certified Question answered.[6] The Court held when a general contractor contractually required a subcontractor to obtain workers' compensation coverage, and the subcontractor contractually required the sub-subcontractor to procure workers' compensation insurance, the exclusive remedy provisions of the Mississippi Workers' Compensation Act protected the general contractor and the subcontractor from claims made by the sub-subcontractor's injured employee.[7]

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[4] *Id.* Brasfield and FabArc claimed the Mississippi Workers' Compensation Act barred Crowe's negligence action. *Id.*

[5] *Id.* The district court determined the purpose of the Workers' Compensation Act was to guarantee coverage to workers. *Id.* The court held the statutory immunity provisions of the Workers' Compensation Act protected Brasfield and FabArc since Model had provided the required coverage. *Id.* The Court reasoned if Model had failed to provide coverage, FabArc would have been obligated to do so. *Id.* at 754. Furthermore, the Court found if Model and FabArc had failed to obtain worker's compensation insurance, Brasfield would have had the duty to provide coverage. *Crowe*, 688 So. 2d at 754.

[6] *Id.* at 757. The court of appeals felt the question of "[w]hether Mississippi's Workers' Compensation Act extends immunity to a general contractor or a subcontractor in a negligence action brought against them by the employee of a sub-subcontractor" was a state law question best answered by the Mississippi Supreme Court. Crowe v. Brasfield & Gorrie Gen. Contractor, No. 95-60050, 1995 WL 769876, at *2 (5th Cir. Dec. 6, 1995).

The Mississippi Supreme Court answered in the affirmative because the general contractor's contractual requirement that the subcontractor obtain insurance fulfilled the general contractor's duty to provide workers' compensation coverage. *Crowe*, 688 So. 2d at 757.

[7] *Crowe*, 688 So. 2d at 757. The Court further noted if a subcontractor did not possess workers' compensation insurance, the injured employee could "ascend the hierarchy" of contractors until coverage was received. *Id.*

I. RELATED LAW

A. *Expansion of Immunity to Contractors Who Are Statutory Employers*

1. *Contractors Who Hire Uninsured Subcontractors*

In *Mills v. Barrett*,[8] the Mississippi Supreme Court first addressed the immunity[9] of employers other than the direct

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[8] 56 So. 2d 485 (Miss. 1952).

[9] *Mills*, 56 So. 2d at 486. The Mississippi Workers' Compensation Act provided "[t]he liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . . [or] anyone otherwise entitled to recover damages at common law . . . ." MISS. CODE ANN. § 71-3-9 (1972). The Mississippi Workers' Compensation Act confines the employee to the benefits of workers' compensation and gives the employer immunity from tort actions. John R. Bradley, *Time Limitations Which Bar Claims in Mississippi Workers' Compensation: A Re-Examination*, 62 MISS. L.J. 511, 516 n.8 (1993). *See* Nowell v. Harris, 68 So. 2d 464, 466 (Miss. 1953) (holding exclusive remedy provision of Mississippi Workers' Compensation Act barred injured employee's common law negligence action against employer who provided workers' compensation benefits). This applies only to employers who regularly employ five or more persons. MISS. CODE ANN. § 71-3-5 (1972). *See* Jackson v. Fly, 60 So. 2d 782, 784-85 (Miss. 1952) (discussing method of counting employees for purpose of Workers' Compensation Act).

The obligation of an employer to pay compensation benefits to an employee injured on the job, regardless of fault, barred the employee from pursuing other remedies against the employer. William Bassin, *An Analysis of Employer Contribution to Third Parties Under Workers' Compensation Statutes*, 30 TORT & INS. L.J. 843, 843 (1995) (citing Joel E. Smith, Annotation, *Modern Status of Effect of State Workmen's Compensation Act on Right of Third-Person Tortfeasor to Contribution or Indemnity from Employer of Injured or Killed Workman*, 100 A.L.R. 3D 350 (1980 & Supp. 1993)). For the purposes of workers' compensation, no distinction is made between an employee injured on the job and an employee killed on the job. Morris v. W.E. Blain & Sons, Inc., 511 So. 2d 945, 947 (Miss. 1987) (citing McCluskey v. Thompson, 363 So. 2d 256 (Miss. 1978)). The exclusive remedy provided for by the Workers' Compensation Act does not violate the right to due process and is therefore constitutional. Walters v. Blackledge, 71 So. 2d 433, 444 (Miss. 1954).

An employee can seek common law remedies if the employer fails to secure workers' compensation benefits. McCoy v. Cornish, 71 So. 2d 304, 307-08 (Miss. 1954). *See* Riddell v. Estate of Cagle, 85 So. 2d 926, 927 (Miss. 1956) (holding purchase of life insurance was not equivalent to procuring workers' compensation and would not provide immunity to employer). An employer has waived his right to immunity when the employee's injury resulted from the employer's willful, malicious, or intentional acts. Miller v. McRae's, Inc., 444 So. 2d 368, 370-71 (Miss. 1984). *See* Sawyer v. Head, 510 So. 2d 472, 476-77 (Miss. 1987) (noting employer[10] as provided for by section 71-3-7 of the Mississippi Code.[11] In *Mills*, the general contractor appealed a lower court decision requiring him to provide workers' compensation benefits for an employee of his subcontractor.[12] The supreme court held when the subcontractor failed to procure workers' compensation insurance, section 71-3-7 of the Mississippi Code shifted the responsibility of obtaining coverage onto the general contractor and made the employees of the uninsured contractor employees of the general contractor for workers' compensation purposes.[13] The court stated that the objective of

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common law actions can be sought against employer only if workers' compensation benefits are denied or employer intentionally caused employee's injury).

[10] *Mills*, 56 So. 2d at 486. The Mississippi Workers' Compensation Act does not bar negligence suits against "any other party," and any damages received from a third party are credited to the employer's compensation carrier. MISS. CODE ANN. § 71-3-71 (1972). *See Sawyer*, 510 So. 2d at 479 (stating any awards from third party are credited to employer's liability); Clark v. McGill, 127 So. 2d 858, 863 (Miss. 1961) (holding common law actions are available against third parties); *see also* McCluskey v. Thompson, 363 So. 2d 256, 259 (Miss. 1978) (holding immunity applied to injured party's co-employees because credit from damages award would relieve employer's burden of compensation); Stubbs v. Green Bros. Gravel Co., 206 So. 2d 323, 325 (Miss. 1968) (holding employees cannot escape exclusive remedy provision of workers' compensation to pursue tort action against co-employee).

[11] *Mills*, 56 So. 2d at 486. The Mississippi Code provided that all employers were liable for securing workers' compensation benefits for their employees and contractors were responsible for compensation of the subcontractors' employees unless the subcontractor had afforded coverage. MISS. CODE ANN. § 71-3-7 (1972). For the purposes of workers' compensation, a subcontractor is one who enters into a contract for the "performance of an act with a person who has already contracted for its performance." O'Neal Steel Co. v. Leon C. Miles, Inc., 187 So. 2d 19, 25 (Miss. 1966) (quoting Holt & Bugbee Co. v. City of Melrose, 41 N.E.2d 562, 563 (Mass. 1942)).

[12] *Mills*, 56 So. 2d at 486. In *Mills*, Barrett received serious injuries in an automobile accident while performing a job-related task for Mills's uninsured subcontractor. *Id.* at 485-86. Barrett then filed a workers' compensation claim against Mills. *Id.*

[13] *Id.* at 486. The court held the clear and unambiguous effect of section 71-3-7 of the Mississippi Code was to make the employees of a uninsured subcontractor employees of the general contractor for the purposes of compensation. *Id.* Generally, in workers' compensation, an employee of a subcontractor was not an employee of the general contractor unless specifically provided for by statute. 82 AM. JUR. 2D *Workers' Compensation* § 172 (1992). Forty-three states, including Mississippi, have enacted statutes that levy compensation liability on general contrac-

section 71-3-7 of the Mississippi Code was to thwart general contractors' efforts to escape compensation liability by hiring financially irresponsible subcontractors and reasoned that the transfer of liability to the general contractor fulfilled this objective.[14] The Court further explained its interpretation of section 71-3-7 of the Mississippi Code in *Mosley v. Jones*.[15] In *Mosley*, the general contractor challenged a negligence suit brought by the employee of an uninsured subcontractor.[16] The general contractor maintained he was the injured employee's statutory employer[17] and entitled to immunity under the exclusive remedy provisions of the Mississippi Workers' Compensation Act.[18] The Mississippi Supreme Court determined that the general contractor was the statutory employer of the injured worker and enjoyed the same immunity afforded direct employers.[19] The court reasoned that

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tors who hire uninsured subcontractors. 4 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 49.11 (1997). In return, the general contractor received assurance that the subcontractor's employee was estopped from asserting additional damage claims. 82 AM. JUR. 2D *Workers' Compensation* § 71 (1992).

[14] *Mills*, 56 So. 2d at 487. The goal of workers' compensation legislation was to safeguard the welfare of uninsured subcontractors' employees by holding the general contractor ultimately responsible for compensation. 4 LARSON & LARSON, *supra* note 13, § 49.14 (1997). The rationale behind this purpose was the ability of the general contractor to choose a responsible subcontractor and insist on the coverage of the subcontractor's employees. *Id.*

[15] 80 So. 2d 819 (Miss. 1955).

[16] *Mosley*, 80 So. 2d at 819-20. In *Mosley*, Jones, an employee of an uninsured subcontractor, alleged Mosley's negligent construction of a scaffold caused it to collapse and injure Jones. *Id.* at 820.

[17] *Id.* A statutory employer is one compelled by law to provide workers' compensation benefits to the employees of another. 82 AM. JUR. 2D *Workers' Compensation* § 229 (1992). The test to determine statutory employment was whether the work being done by the subcontractor's employees would routinely be done by the general contractor's employees. 4 LARSON & LARSON, *supra* note 13, § 49.00 (1997).

[18] *Mosley*, 80 So. 2d at 820. Mosley asserted, under section 71-3-7 of the Mississippi Code, the subcontractor's failure to obtain coverage for Jones placed Jones under Mosley's workers' compensation policy. *Id.* Mosley then argued his compliance with the Workers' Compensation Act granted him immunity and prevented Jones from maintaining a negligence claim. *Id.*

[19] *Id.* at 821. In *Mosley*, the court determined the failure of the subcontractor to provide insurance made Mosley a statutory employer responsible for procuring

the subcontractor's failure to obtain insurance obligated the general contractor to provide benefits, and the subsequent payment of workers' compensation benefits barred additional common law actions.[20]

2. *Contractors Who Contractually Require Their Subcontractors to Procure Insurance*

The Mississippi Supreme Court expanded the application of statutory employer immunity to general contractors who contractually required their subcontractors to secure workers' compensation in *Doubleday v. Boyd Construction Co.*[21] In *Doubleday*, the general contractor contractually required the subcontractor to carry workers' compensation insurance for the subcontractor's employees.[22] The injured employee received benefits from the subcontractor's workers' compensation carrier and then brought a negligence suit against the general

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coverage, and the only remedy available to Jones was under Mosley's workers' compensation insurance. *Id.* at 823. *See* Vance v. Twin River Homes, Inc., 641 So. 2d 1176, 1182, 1184 (Miss. 1994) (holding failure of subcontractor to obtain workers' compensation characterized injured employee as statutory employee of general contractor and required general contractor to provide benefits).

[20] *Mosley*, 80 So. 2d at 821-23. Under the Workers' Compensation Act, a statutory employer enjoyed the same immunity as a regular employer. *Id.* at 821 (quoting 2 ARTHUR LARSON, WORKERS' COMPENSATION LAW § 72.31 (1952)).

The court further noted an award of workers' compensation benefits prohibited additional claims against an employer but did not affect the right of an employee to sue a third party. *Id.* at 820. The court adopted the view that the general contractor was a statutory employer and not a third party when an employee sustained injuries while engaged in work that was part of the business, trade, or occupation of the general contractor. *Id.* at 821 (quoting 2 ARTHUR LARSON, WORKERS' COMPENSATION LAW, § 72.31 (1952)). *See also* Morris v. W.E. Blain & Sons, Inc., 511 So. 2d 945, 948 (Miss. 1987) (stating exclusive remedy did not apply to co-subcontractors as they are "any other party"); Ray v. Babcock & Wilcox Co., 388 So. 2d 166, 167-68 (Miss. 1980) (holding when employee was engaged in service of two employers in relation to the same act, only one had to provide workers' compensation, but both enjoyed common law immunity).

[21] 418 So. 2d 823 (Miss. 1982).

[22] *Doubleday*, 418 So. 2d at 827. Boyd Construction ("Boyd"), the general contractor, subcontracted a portion of road construction work to W. T. Ratliff Co. ("Ratliff"). *Id.* at 824. In the subcontract, Boyd required Ratliff to secure workers' compensation coverage for Ratliff employees. *Id.* Ratliff complied with this provision. *Id.*

contractor.[23] After addressing the legislative intent behind the Workers' Compensation Act,[24] the Mississippi Supreme Court held that a general contractor who contractually required a subcontractor to obtain workers' compensation became the statutory employer of the insured subcontractor's workers and that an employee entitled to workers' compensation through the subcontractor could not bring suit against the general contractor.[25] The court reasoned that the general contractor fulfilled the obligation under section 71-3-7 of the Mississippi Code to secure coverage by requiring the subcontractor to provide workers' compensation insurance.[26]

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[23] *Id.* Ratliff employed Doubleday to work on the Boyd project. *Id.* An automobile struck Doubleday while he was working and injured him. *Id.* Doubleday collected workers' compensation from Ratliff and then sued Boyd for negligently failing to provide a safe work environment. *Id.* The trial court dismissed Doubleday's action and declared that since Boyd was Doubleday's statutory employer Doubleday's exclusive remedy was under workers' compensation. *Doubleday*, 418 So. 2d at 824. On appeal, Doubleday asserted that Boyd was not a statutory employer as provided for by section 71-3-7 of the Mississippi Code because the subcontractor, Ratliff, had secured compensation. *Id.* Doubleday claimed Ratliff's purchase of insurance relieved Boyd's obligation to do so thereby making Boyd a third party subject to suit. *Id.*

[24] *Id.* at 825-26. The *Doubleday* court stated that any interpretation of the Workers' Compensation Act must be "sensible as well as liberal," and the legislative intent should be "determined by the total language of the statute" and not merely from an isolated section of the act. *Id.* at 826 (citing McCluskey v. Thompson, 363 So. 2d 256, 259). *See* Brady v. Hancock Mut. Life Ins. Co., 342 So. 2d 295, 298, 303 (Miss. 1977) (stating statute's total language determined legislative intent and interpretation should best achieve statute's purpose).

The court additionally noted the effect of the Workers' Compensation Act was to replace common law actions with a "no-fault system of payment." *Doubleday*, 418 So. 2d at 825. Statutes that derogate common law rights should not be construed strictly and to do so "assumes the legislation is something to be deprecated." 3 ROSCOE POUND, JURISPRUDENCE § 111 (1959).

[25] *Doubleday*, 418 So. 2d at 826. In *Doubleday*, the court held the purpose of section 71-3-7 of the Mississippi Code was to encourage general contractors to require their subcontractors to carry insurance, *Id.* (citing 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 72.31(b) (1982)), and to protect the employees of uninsured subcontractors. *Id.* The court stated it would be "paradoxical" to expose general contractors to tort suits when they required their subcontractors to obtain insurance and to confine the general contractor's liability to workers' compensation when they hired uninsured subcontractors. *Id. See* Walker v. United Steel Works, Inc., 606 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1992) (holding general contractor's obligation to provide compensation in event of subcontractor default rendered general contractor immune); Miami Roofing & Sheet Metal Co. v. Kindt, 48 So. 2d 840, 843 (Fla. 1950) (stating when general contractor secured compensation, either directly or indirectly through subcontractor, immunity attached).

B. *Limitation of Statutory Immunity Previously Granted in* Doubleday v. Boyd Construction Co.

In *Nash v. Damson Oil Corp.*[27] the Mississippi Supreme Court cast doubt on the holding in *Doubleday* which provided that general contractors were the statutory employers of insured subcontractor's employees. In *Nash*, a company leased a section of land, hired an independent contractor to perform various services on the property, and contractually required the independent contractor to secure workers' compensation coverage.[28] An injured employee of the independent contractor received compensation from the independent contractor and subsequently filed suit against the company for damages.[29] The court held that the company was not entitled to immunity because its ownership-like interest was not the type of "contractor" provided for in section 71-3-7 of the Mississippi Code.[30] The court additionally held the exclusive remedy provisions of the Workers' Compensation Act did not protect the company since the company was not personally liable to provide compensation.[31]

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[26] *Doubleday*, 418 So. 2d at 826. When an employee of the lowest subcontractor incurred injuries while on the job, there was no need to look any further than the first insured contractor for compensation. 4 LARSON & LARSON, *supra* note 13, § 49.14 (1997). Immunity attached, even to the general contractor, as long as a contractual duty to provide workers' compensation existed. Robert L. Dietz, *Torts in the Work Place: How Exclusive is the Exclusive Remedy?*, 68 FLA. B.J. 72, 74 (1989). *See also* Sites Constr. v. Harbeson, 434 S.E.2d 1, 3 (Va. Ct. App. 1993) (holding first statutory employer with adequate coverage responsible for compensation liability, therefore, insured sub-subcontractor had to provide benefits).

Numerous other jurisdictions have extended immunity to the general contractor when an employee of an insured sub-subcontractor is injured and seeks damages from the general contractor. *See* Dodge v. William E. Arnold Co., 373 So. 2d 98, 100 (Fla. 1979) (affirming trial court's decision that general contractor was not liable in tort to employee of sub-subcontractor); Albin v. Red Stick Constr. Co., 509 So. 2d 110, 112 (La. Ct. App. 1987) (holding general contractor was statutory employer of sub-subcontractor's employees and protected from tort suits). *See generally* 4 LARSON & LARSON, supra note 13, § 49.14 n.8 (1997) (citing cases from various jurisdictions that extend statutory immunity to general contractors).

[27] 480 So. 2d 1095 (Miss. 1985).

[28] *Nash*, 480 So. 2d at 1096-97. Damson Oil Corporation ("Damson") leased an oil well and hired Trigger Contractors, Inc. ("Trigger") to perform "certain work with respect to oil or gas wells." *Id.* at 1096. The contract provided that Damson would have no control over Trigger or its employees except in the approval of work. *Id.* at 1097. Trigger complied with the provisions of the contract requiring the purchase of workers' compensation insurance. *Id.* Nash, an employee of Trigger, alleged a Damson employee incorrectly instructed him on installation of a valve and caused Nash's injury. *Id.*

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[29] *Id.* at 1097-98. Nash maintained Damson was a third party unprotected by the statutory immunity of the Workers' Compensation Act. *Id.* at 1098. Damson filed for summary judgment asserting it was Nash's statutory employer and entitled to immunity from a negligence suit. *Id.*

[30] *Id.* at 1100. The *Nash* court noted the difficulty in defining the term "contractor," but determined Damson did not fall within the meaning of the word because his ownership-like interest and use of the property was distinctive from that of a general contractor. *Id.* One who was not a general contractor could not be a statutory employer but was rather "any other party" against which a suit could be maintained. *Id. See* Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 184 (Miss. 1989) (stating owner of right-of-way who contracted out construction of pipeline was not statutory employer of contractor's employees and not entitled to immunity); Falls v. Mississippi Power & Light Co., 477 So. 2d 254, 258 (Miss. 1985) (holding permittee, unlike general contractor, had no duty to provide compensation and was therefore liable as third party); *cf.* Brown v. Williams, 504 So. 2d 1188, 1193-94 (Miss. 1987) (stating contractor's partial ownership in well that he also contracted to drill did not remove statutory immunity).

In a separate concurrence, Presiding Justice Roy Noble Lee, joined by Chief Justice Patterson, Presiding Justice Walker, and Justice Hawkins, stressed that the heart of the decision was whether or not Damson was a "contractor" under section 7-3-7 of the Mississippi Code. *Nash*, 480 So. 2d at 1101 (Lee, P.J., concurring)

[31] *Nash*, 480 So. 2d at 1099. The *Nash* court believed the trade-off inherent in the Workers' Compensation Act required an employer to assume the burdens and obligations of workers' compensation in exchange for immunity from the potentially "sizable judgment" of a tort suit. *Id.* The court in *Nash* stated the exclusive remedy provision only granted immunity to those who are subjected by law to the burdens and obligations of compensation. *Id.* The court held Damson's contractual requirement that Trigger secure compensation was of "little consequence" because Trigger's procurement of insurance released Damson from its obligation to pay compensation. *Id.* The court also noted the effects of extending immunity to the general contractor of an insured subcontractor would mean that any time "A" contractually required "B" to secure compensation "A" would receive protection even if "A" was a grievous tortfeasor. *Id.* at 1100.

In a special concurrence, Justice Sullivan, joined by Justice Dan M. Lee, emphasized that a general contractor became a statutory employer only after the subcontractor failed to provide worker's compensation and that Damson was a

II. CROWE V. BRASFIELD & GORRIE GENERAL CONTRACTOR, INC.

A. *Opinion of the Court*

In *Crowe v. Brasfield & Gorrie General Contractor, Inc.*[32] the Mississippi Supreme Court extended the immunity afforded by the Mississippi Workers' Compensation Act to a general contractor and a subcontractor in a negligence action brought by an employee of an insured sub-subcontractor.[33] The supreme court adopted the position that the term "subcontractor," as used in section 71-3-7 of the Mississippi Code, included those who contracted directly with the general contractor as well as those who contracted with the general contractor's subordinate contractors.[34] The court then acknowledged the

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third party since Damson's statutory duty to provide compensation never arose. *Nash*, 480 So. 2d at 1102-03 (Sullivan, J., specially concurring).

In a decision subsequent to *Crowe*, the Mississippi Supreme Court, turning away from *Nash*, reasoned that "the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if [the subcontractor] does not should be sufficient to remove him from the category of 'third party'" and held a general contractor immune from suits by an insured sub-subcontractor's employee. Salyer v. Mason Techs., Inc., 690 So. 2d 1183, 1185 (Miss. 1997) (quoting *Doubleday*, 418 So. 2d at 826). The court additionally determined that no distinction existed between a general contractor who contractually required his subcontractor to provide compensation and a general contractor who hired a subcontractor who already possessed insurance. *Salyer*, 690 So. 2d at 1185. In another post-*Crowe* decision, the Mississippi Supreme Court extended immunity to a general contractor who orally required his subcontractor to provide compensation coverage and noted that emphasis should not be placed on who "secured" compensation but rather on the relationship between the parties. Richmond v. Benchmark Constr. Corp., 692 So. 2d 60, 62-63 (Miss. 1997). The general contractor had a duty to provide compensation in the event that the subcontractor failed to dispense benefits and therefore received immunity. *Richmond*, 692 So. 2d at 60, 62-63.

[32] 688 So. 2d 752 (Miss. 1996).

[33] *Crowe*, 688 So. 2d at 757. The court stated the exclusive remedy of workers' compensation protected the general contractor and the subcontractor from negligence suits brought by injured employees of an insured sub-subcontractor. *Id.* The court noted if the sub-subcontractor did not possess insurance, the employee could "ascend the hierarchy" of contractors until he obtained benefits. *Id.*

[34] *Id.* at 755. The court stated all who possessed contracts descending from the original contract were subcontractors. *Id.* The court further explained that "no distinctions" were recognized in the application of the act despite the "different

importance of giving a liberal yet sensible interpretation of the Workers' Compensation Act and concluded the legislature did not intend for the general contractor to be exposed to common law negligence suits if he had made contractual arrangements to protect the subcontractor's employees.[35]

Next, the court held the general contractor did not have to directly require the sub-subcontractor to obtain workers' compensation in order to receive immunity.[36]

Finally, the court distinguished statutory employers from third parties and stated a vertical hierarchy must exist between the concerned parties before statutory employment can be claimed.[37]

B. Dissenting Opinion

Justice McRae, joined by Presiding Justice Sullivan, Justice Pittman, and Justice Banks, wrote a dissenting opinion that argued the injured employee of a subcontractor who received benefits from his immediate employer should be allowed to pursue a negligence action against the general contractor and the subcontractor because the general contractor

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degrees" of separation from the original contract. *Id.*

[35] *Id.* The court relied on *Doubleday* which stated the legislature did not intend to expose the general contractor to tort liability after he required the subcontractor to obtain workers' compensation insurance. *Id.* (citing Doubleday v. Boyd Constr. Co., 418 So. 2d 823, 826 (Miss. 1982)). The court restated its opinion from *Mosley* that a general contractor who required a subcontractor to procure workers' compensation insurance was not "any other party" who could be sued in a common law negligence action. *Id.* (citing Mosley v. Jones, 80 So. 2d 819, 823 (Miss. 1955)).

[36] *Id.* at 756-57. The court held the general contractor could fulfill its obligation to provide workers' compensation insurance either directly by personally obtaining insurance or indirectly by contractually requiring a subcontractor to secure coverage. *Id.* at 757. The court further indicated the general contractor was not limited to these two methods of securing coverage. *Id.* The court held when a general contractor contractually required a subcontractor to provide workers' compensation insurance and the subcontractor, in turn, required the sub-subcontractor to procure insurance, immunity attached because the purposes of the Workers' Compensation Act were realized. *Id.*

[37] *Id.* The court stated a contract must exist between the parties for statutory immunity to apply. *Id.* Co-subcontractors, the court reasoned, do not enjoy immunity under the provisions of the Workers' Compensation Act. *Id.*

and the subcontractor were not statutory employers.[38]

II. Discussion

In *Crowe v. Brasfield and Gorrie General Contractors, Inc.*, the Mississippi Supreme Court, joining numerous other jurisdictions, granted statutory employer status as provided for by section 71-3-7 of the Mississippi Code to general contractors and subcontractors who contractually require their subcontractors to obtain workers' compensation insurance.[39] Extending immunity to the general contractor and the subcontractor realizes the workers' compensation goals of limiting the recovery of injured employees to that of workers' compensation and encouraging contractors to hire responsible subcontractors.[40] However, the holding in *Crowe* effectively eliminates the trade-off between employers and employees which is the cornerstone of workers' compensation.[41] Because workers' compensation requires an employer to secure compensation in exchange for immunity, a better reasoned decision would either compel a general contractor to personally secure compensation or subject the general contractor to tort liability.[42]

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[38] *Crowe*, 688 So. 2d at 758. The dissenters felt the legislature did not intend for injured employees to be limited in their remedies. *Id.* at 760 (McRae, J., dissenting). The dissent also noted Brasfield's contractual requirement that FabArc obtain insurance and FabArc's contractual requirement that Model secure compensation were already mandated by law. *Id.* at 758 (McRae, J., dissenting). The dissenters emphasized the fact that neither Brasfield or Model had obtained coverage for Crowe. *Id.* at 760 (McRae, J., dissenting). The dissenters reasoned since Brasfield's and FabArc's statutory duty to provide compensation never arose, they were not statutory employers entitled to immunity. *Id.* (McRae, J., dissenting).

[39] *See supra* notes 9, 19, 25, 26 and accompanying text. As statutory employers, general contractors and subcontractors are granted immunity from tort suits brought by an insured sub-subcontractor's employees. *See supra* notes 9, 19, 25, 26 and accompanying text.

[40] *See supra* notes 9, 25 and accompanying text. The court's holding protects the employee's interests while conforming to the exclusive remedy provisions of the Workers' Compensation Act. *See supra* notes 9, 14, 20 and accompanying text. Additionally, the decision invites contractors to implement responsible hiring practices. *See supra* note 25 and accompanying text.

[41] *Crowe*, 688 So. 2d at 756-57. The *Crowe* opinion does not require the general contractor to assume any of the burdens of compensation. *Id.*

[42] *See supra* notes 9, 13, 31 and accompanying text. The trade-off inherent in

Furthermore, the *Crowe* decision severely limits an injured employee's remedies against a negligent party.[43] The Workers' Compensation Act should be interpreted to protect the employee by allowing the injured worker to seek additional damages from a negligent general contractor who does not personally acquire workers' compensation coverage.[44]

Finally, the *Crowe* opinion fails to address the potential problems inherent in granting immunity to general contractors. The *Crowe* opinion may give way to more liberal interpretations of the Workers' Compensation Act creating an unending chain of immunity.[45] Additionally, the court's holding may generate tension between general contractors and their subcontractors[46] and encourage abuse of the Workers' Compensation Act.[47]

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workers' compensation demands the general contractor assume the burdens of compensation. *See supra* notes 9, 31 and accompanying text. However, a statutory employer of an insured subcontractor has not taken on any burden other than hoping the subcontractor does not default. *See supra* notes 9, 31 and accompanying text.

[43] *Crowe*, 688 So. 2d at 757. The court's decision bars an injured employee claim against negligent general contractors and limits them to the compensation provided by the sub-subcontractor. *Id.*

[44] *See supra* note 31 and accompanying text. The goal of section 71-3-7 of the Mississippi Code is to protect the employees of uninsured subcontractors. *See supra* note 14 and accompanying text. The general contractor has no duty to protect the employees of an insured subcontractor and should therefore be a third party liable for any negligent acts. *See supra* note 31 and accompanying text.

[45] *See supra* note 31 and accompanying text. The unlimited effect of *Crowe* is demonstrated by a later decision which allows an oral requirement of coverage to suffice as securing compensation. *See supra* note 31 and accompanying text. Another post-*Crowe* opinion has determined that a general contractor is protected merely by hiring a previously insured subcontractor. *See supra* note 31 and accompanying text.

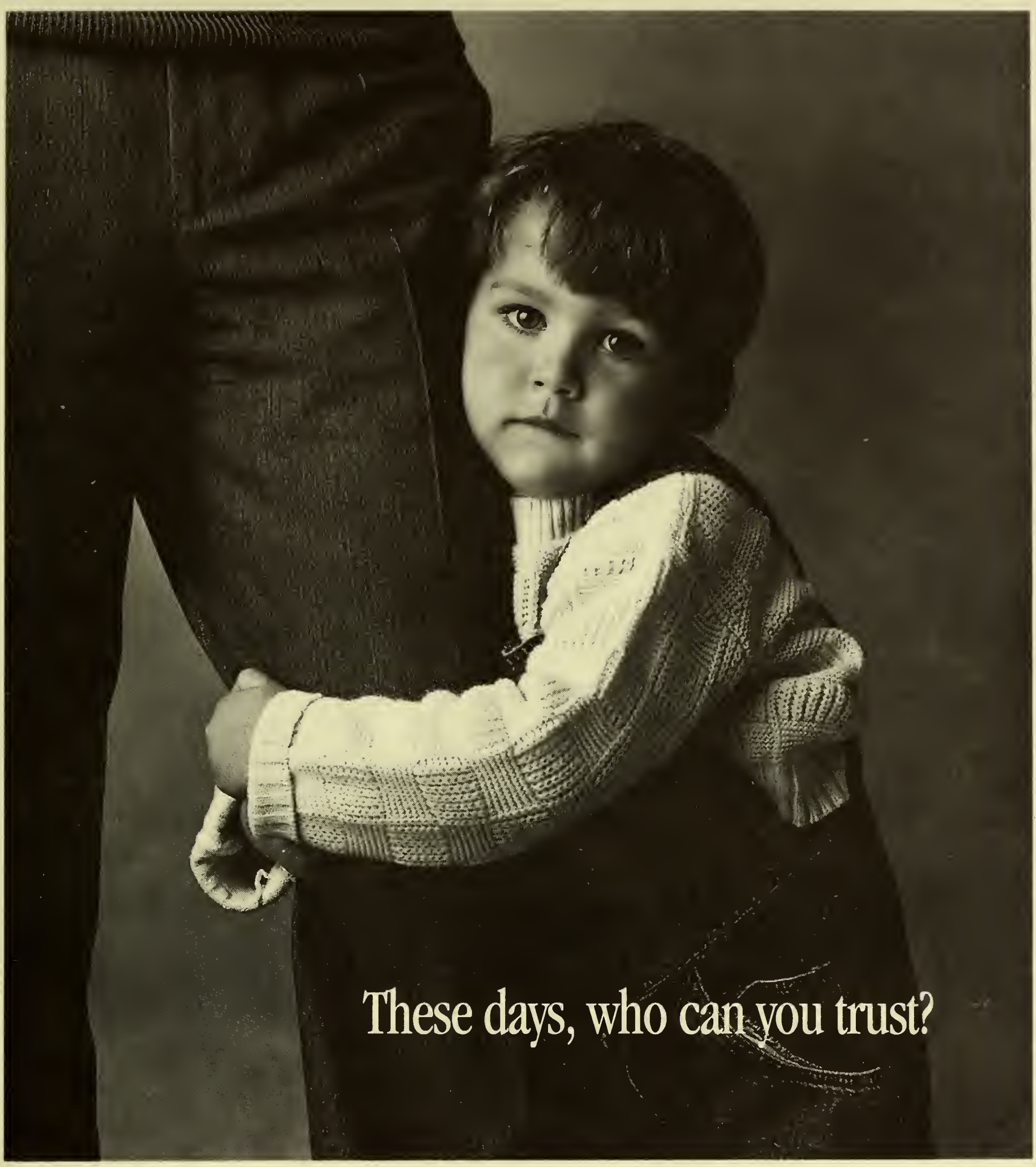
[46] *See supra* note 10 and accompanying text. A subcontractor might be hesitant to enter into a contract with a general contractor who contractually requires coverage because, if an employee is injured and cannot seek damages, the subcontractor cannot pursue indemnification. *See supra* note 10 and accompanying text.

[47] *See supra* note 31 and accompanying text. There is a possibility a general contractor will develop substandard work conditions if he is immune from negligent acts. *See supra* note 31 and accompanying text.

IV. CONCLUSION

The *Crowe* decision benefits general contractors and subcontractors while placing sub-subcontractors and their employees at a disadvantage. While fulfilling several purposes of the Workers' Compensation Act, *Crowe* fails to protect the worker. The ramifications of *Crowe* are far reaching and may have a negative impact on the construction industry.

Kim Sands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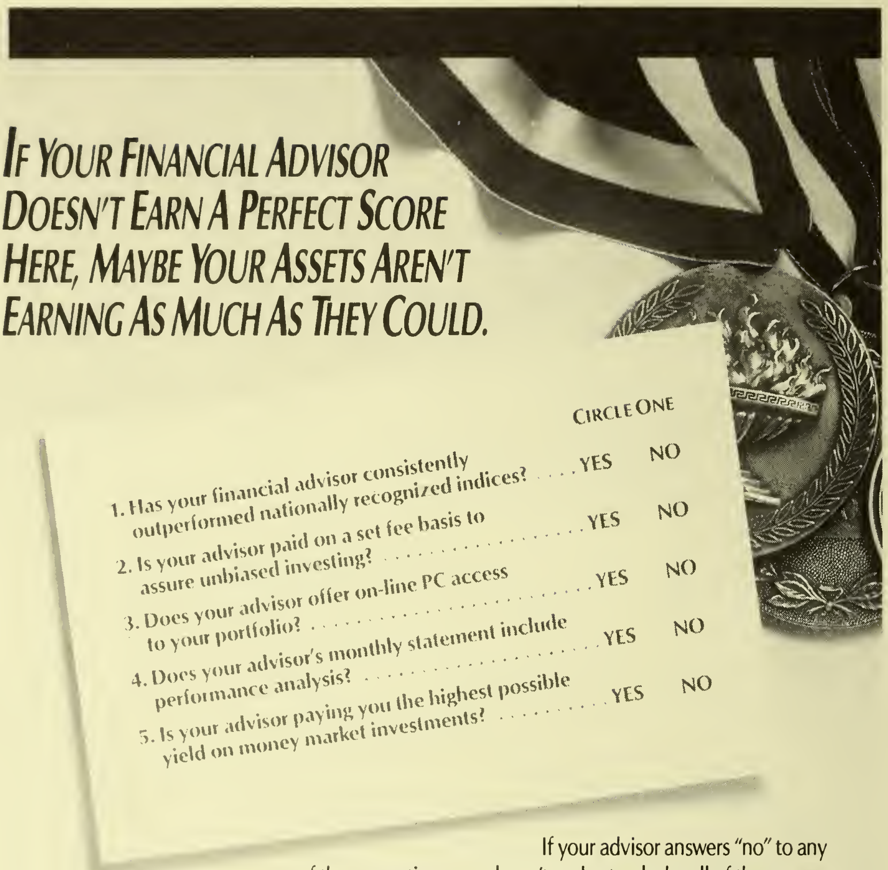

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